FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al.,

Petitioners,

v.

RONALD G. BRADLEY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF THE CITY OF DETROIT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I

Was the inclusion of remedial programs in reading, in-service training, testing, and counseling and guidance in the Detroit desegregation plan within the power of equity, when overwhelming record evidence establishes that they are essential in Detroit to eliminate all vestiges of segregation and overcome obstacles to desegregation?

II

Where the State Defendants have been adjudicated to have violated the Fourteenth Amendment rights of Detroit school children, may the Tenth Amendment be invoked as a bar to remedying this constitutional violation?

III

Does the Eleventh Amendment or decisions of this Court prevent federal equity jurisdiction from ordering State Defendants, who have been found guilty of *de jure* segregation, to finance part of the implementation of a desegregation plan?

IV

When the District Court orders State Defendants to assist in remedying constitutional violations they have caused, can state laws hinder the implementation of that remedy?

V

When the District Court allocated the remedy between joint wrongdoers, was it proper to consider the pervasive State control of education and the critical financial condition of the Detroit Board?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Explanatory Note

Herein, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the page number, e.g., (A 12).

Appendix of Respondent, "AR" followed by the page number, e.g., (AR 12ar).

Record of the Remedy Hearings, "RR" followed by the volume number and the page number, e.g., (RR I 12).

Record of the Violations Hearings, "RV" followed by the volume number or date and the page number, e.g., (RV I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec. 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

Exhibits introduced in depositions, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education and F for Detroit Federation of Teachers, followed by "Dep", followed by the last name of the individual deposed, followed by an "X" and the number of the exhibit, e.g., (P Dep Johnson X 5).

COUNTER STATEMENT OF THE CASE

This is a school desegregation case in the fifth largest school district in the United States (Detroit, Michigan), which has an enrollment of approximately 236,000 students, 79.2% black and 20.5% white. The issues raised by the State Defendants pertain to the remedy and ignore the history of this litigation.

In the late 1960's the Detroit Board adopted two policies designed to desegregate Detroit schools. First, students transferred from overcrowded schools were to be assigned to the nearest school that would improve the racial mix. (Drachler Deposition *de bene esse*, 46, 49-51). Second, students seeking a transfer to another school under the open enrollment program, could only do so if the racial mix could be improved at the receiving school. (Drachler Deposition *de bene esse*, 151). In addition, on April 7, 1970, the Detroit Board adopted a plan to revise attendance zones of high schools which would have resulted in the further desegreg tion of the school system.

The State Legislature promptly responded by passing Act 48 of the Public Acts of 1970 on July 7, 1970. This Act suspended implementation of the April 7, 1970 desegregation plan. Act 48 also thwarted the two aforementioned existing desegregation policies of the Detroit Board. Section 12 gave a priority to students residing nearest a school, when school officials sought to transfer students to alleviate overcrowded conditions, or when a student sought to transfer to a school to participate in vocationally oriented courses or other specialized curriculum. No longer was it possible for the Detroit Board to channel these transfers in a manner which would improve the racial mix.

Act 48 precipitated the commencement of this action on August 18, 1970. A complaint was filed by individual black and white children and their parents, and the Detroit Branch of the NAACP against the Governor of the State of Michigan, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction, the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools. The Treasurer of the State of Michigan was subsequently added as a Defendant. The complaint alleged that the

Detroit public school system was segregated on the basis of race resulting from the actions and policies of the State Defendants and the Detroit Board.

The Plaintiffs' complaint further alleged a denial of "equal educational opportunities". The Plaintiffs requested relief which included the following:

> f. Enter a decree enjoining defendants, their agents, employees and successors from approving budgets, making available funds, approving employment and construction contracts, locating schools or school additions geographically, and *approving policies, curriculum and programs,* which are designed to or have the effect of maintaining, perpetuating or supporting racial segregation in the Detroit school system. (emphasis added)

After trial of the case on the issue of segregation, the District Court held that the Detroit public school system was racially segregated as a result of the unconstitutional practices of both the State Defendants and the Detroit Board. *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971).

The District Court found that the State Defendants committed constitutional violations with respect to the exercise of its general responsibility over supervision of public education. The Court pointed to Act 48 as an example of State conduct intended "to impede, delay and minimize racial integration in Detroit schools". The Court further found that until the 1970 Legislative Session, the State failed to authorize participation by Detroit pupils in transportation aid programs. At the same time, the State supplied mostly white suburbs, many of which neighbored Detroit with the full panoply of State supported transportation. Even after 1970, although Detroit was authorized to participate in a transportation aid program, the State did not allocate any funds to the Detroit school system. *Bradley* v. *Milliken, supra* at 589. Subsequently, the Michigan Legislature further mandated that allocations to the school transportation aid fund were not to be used for desegregation purposes. Mich. Comp. Laws Ann. §388.1179.

The District Court found that the State Board of Education, which exercised control over local school construction, paid no attention to statements and guidelines contained in a "School Plant Planning Handbook", which required the State Board to consider whether selection of school sites would result in racially segregative patterns. The State Board of Education was found to have approved school construction locations that had the dual segregative effect of (1) maintaining segregated school attendance areas and (2) removing majority white feeder schools from almost all black attendance areas. *Bradley* v. *Milliken, supra* at 588-89.

The District Court further found that the State Board of Education either tacitly or expressly approved the cross district transportation of black high school students from a neighboring suburban school district, bypassing white Detroit high schools which were under capacity, to a black high school in Detroit. *Bradley* v. *Milliken, supra* at 593. Finally, as a result of their pervasive supervisory authority and control over local school districts, the State Board of Education and its Superintendent, as well as the other State Defendants, were held responsible for the segregative actions of the Detroit Board. *Bradley* v. *Milliken, supra* at 593.

These findings of *de jure* acts of segregation by the State Defendants were affirmed by the United States Court of Appeals, *Bradley* v. *Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973). In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), this Court remanded the case for formulation of a desegregation plan limited to the boundaries of the City of Detroit. However, this Court, although urged by State Defendants in 1974 to do so, did not set aside the findings made in the violation stage of the proceedings that the State Defendants had committed acts of *de jure* segregation.[1]

Upon remand the case was assigned to the Honorable Robert E. DeMascio, who ordered the Plaintiffs and the Detroit Board to submit desegregation plans. The original plan submitted by

[1] In *Hills* v. *Gautreaux*, 425 U.S. 284, 298 n. 13 (1976) this Court recognized that the State of Michigan had been found in *Milliken* v. *Bradley*, 418 U.S. 717, 734-35 n. 16 (1974) to have committed constitutional violations contributing to racial segregation in Detroit schools.

the Detroit Board included thirteen educational components in addition to pupil reassignment. The State Board of Education was ordered to submit a critique of the Detroit plan, and approved the inclusion of eight of the proposed components as "deserving of special emphasis" in a desegregation plan. (A 91).

Hearings on the two plans commenced on April 29, 1975, and lasted some thirty-two days, ending on June 16, 1975. Approximately one-half of the testimony at these remedial hearings concerned educational components.

In his opinion, the District Judge rejected a proposed massive bussing plan. He reasoned that because of the large percentage of black pupils enrolled in Detroit schools a transportation plan to achieve a racial mix would produce "negligible desegregative results".[2] Instead the Court ordered a more realistic bussing plan, and utilized other techniques of desegregation including changing attendance zones, leaving schools untouched that were in stabilizing neighborhoods, ordering magnet schools, and developing a system of city-wide open enrollment schools. Remedial programs in reading, in-service training, testing, and counseling and guidance were an integral part of this carefully devised desegregation plan.

The District Court found that the four components at issue here, reading, in-service training, testing, and counseling and guidance, were remedial programs essential to remedy the effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation. (PA 127a-37a).

These findings of the District Court are amply supported by the testimony of expert witnesses offered by the State Defendants themselves, the Plaintiffs and the Detroit Board. (A28, A33, A38, A51, A54, A55, A58, A60, A62, A85).

[2] In 1961 the Detroit school system had 285,512 students, 45.8% black, 53.6% white. At the start of this litigation in 1970, the system had 289,457 students, 63.7% black, 34.8% white. In the fall of 1975, the system had 247,774 students, 75.1% black, 22.9% white. By fall 1976, the system had 235,895 students, 79.2% black, 20.5% white.

The State Defendants never objected to the trial court's finding and in fact worked with the Detroit Board in developing the actual programs to be implemented which were then submitted to the Court for approval. Only when they were ordered to pay a part of the cost of implementation did the State Defendants appeal the inclusion of educational programs in the desegregation plan.

These programs cannot be dismissed as expansions of existing programs, but are new programs developed, pursuant to Court order, to eliminate the "vestiges of segregation" in a school system undergoing desegregation and to overcome obstacles to effective desegregation. (PA 127a-37a). The District Court entered various orders approving these submissions and ordering their implementation. (PA 92a-95a, 127a-37a, 146a). The careful development of the educational components clearly demonstrates that the District Court engaged in a thoughtful and deliberate process over an extended period of time to fashion a desegregation program tailored to the desegregation needs of Detroit. (PA 168a-72a).

The Court of Appeals concluded that the findings of the District Court were supported by "ample" record evidence and held that the District Court acted within its equity powers when it included these components as part of the remedy. *Bradley* v. *Milliken*, 540 F.2d 229 (6th Cir. 1976); (PA 171a).

Pursuant to the May 11, 1976 Order, the District Court required the Detroit Board to submit to the State Board of Education "its highest budget allocated in any year for each of the . . . quality education programs", and thereafter, compute "the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs". (PA 146a-47a). By this computation the District Court was able to reduce the original estimate and limit the cost to $11,645,000 Dollars, and require the State Defendants and the Detroit Board to share the responsibility. This figure amounts to approximately $49.38 per student in Detroit, of which $24.69 per student is to be paid by the State Defendants.

The State Defendants and the Detroit Board were ordered to share equally in the costs of the educational components as each

was found guilty of causing the segregation in the Detroit schools.

The Detroit Board is beset by serious financial problems, including the adoption of a survival budget in 1971, virtual bankruptcy of the system, an eroding tax base, and constant millage failures. Since August 15, 1975 three millages have failed (two on August 3, 1976, one on November 2, 1976).

The school millage level is slightly below the state average, but the millage levy in addition to all other taxes in Detroit (county, city property, city income, city utility) results in a cumulative tax burden on Detroit taxpayers which is greatly in excess of the state average. (A21-23). The State has recognized this problem by supplying aid to school districts whose municipal tax average is in excess of One Hundred Twenty-Five (125%) Percent of the State average. (A23). Mich. Comp. Laws Ann. § 388.1125. In the last two years the municipal overburden provisions of the School Aid Act, of which Detroit is the primary beneficiary, has never been funded at more than 28% of the maximum funding allowed by the school aid formula. The result is the State of Michigan does not supply the Detroit Board with all the money state law mandates.

Finally, the Governor of Michigan has provided in the Executive Budget for the fiscal year 1977-1978 that the Detroit Board will be required to submit its budget and expenditure data to the Governor through the State Department of Management and Budget for a comprehensive State level review and report to the Governor and the Superintendent of Public Instruction. Based on the Governor's budget message, it does not appear that such limitations will be placed on any other school districts. The State's requirement of budget review is indicative of the pervasive state control, particularly over the Detroit school district.[3]

The United States Court of Appeals in *Bradley* v. *Milliken*, 540 F.2d 229, 241-42 (6th Cir. 1976) affirmed the judgment of the

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[3] See, William G. Milliken, *Executive Budget - Fiscal Year 1977-78*, p. J32; William G. Milliken, *Michigan State of the State Message - January 1977*, p. 40.

District Court requiring State Defendants to share in the cost of the educational components and allocated those costs between the State Defendants and the Detroit Board. In so doing, the Court of Appeals said:

> We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have [28] a causal relation to the de jure segregation that exists in Detroit. 540 F.2d at 245; (PA 178a).
>
> The fiscal justification for the decision of the District Court in requiring that the State of Michigan pay one-half of the costs of the desegregation plan (to the extent specified in the orders and judgments) is supported abundantly by the evidence with respect to the critical financial problems now confronting the Detroit Board of Education. 540 F.2d at 246; (PA 179a).

This Court granted the State Defendants Petition for Certiorari.

SUMMARY OF ARGUMENT

This appeal involves the propriety of the District Court's inclusion in the Detroit desegregation plan of a reading program to remedy deficiencies caused by segregation, non-discriminatory testing and guidance and counseling programs, and an in-service training program to sensitize teachers to the needs of black students who have been victims of racial discrimination and to the problems of teaching in a desegregated setting. The District Court found these four remedial programs were necessary to eliminate the effects of past segregation, to make desegregation work and to prevent resegregation.

These findings of the District Court are supported by the evidence and are within the scope of the remedy for segregation. The remedy of desegregation in Detroit must include more than pupil reassignment to correct the inequities and discrimination inherent in the violation of segregation. Once the constitutional violation of segregated schools has been found, it is within the broad flexible power of equity to "eliminate all vestiges of segregation", to overcome obstacles to effective desegregation and prevent resegregation.

The findings of the District Court are amply supported by the testimony of expert witnesses offered by the State Defendants, the Plaintiffs and the Detroit Board. No contradictory evidence was offered.

These new remedial programs cannot be characterized as the kind of "quality education" any school system should have. Nor can they be dismissed as expansions of existing programs. Each is specifically designed to meet the needs of children who have been victims of segregation and to overcome obstacles to effective desegregation. Each program accomplishes in fact the objective for which it was designed.

Because the effects of segregation can and do take many forms, the remedy of desegregation may include more than pupil reassignment. No separate violation in the area of reading, in-service training, testing, or counseling and guidance is necessary for the District Court to include these four programs as part of the remedy for segregation for it is these four educational components that assist in remedying the violation of segregation.

The law of this case is that the State Defendants along with the Detroit Board have been found guilty of *de jure* segregation of the Detroit school system. Therefore, the responsibility for implementing the four educational components necessary to remedy the effects of segregation must be shared by the State Defendants, the joint wrongdoers.

The Tenth Amendment is not an obstacle to the State Defendants' participation in the remedy because they have been found to have caused segregation in Detroit. The order here is designed to remedy a constitutional wrong. It does not interfere with or obstruct the lawful operation of state government.

Nor is the Eleventh Amendment a bar to the State Defendants' participation in the implementation of the remedy. It is well settled that prospective injunctive relief directed toward state officials, which is designed to remedy school segregation, may have a permissible ancillary financial impact on the state treasury. The Eleventh Amendment was never intended to shield the State Defendants from remedying a violation of the subsequently ratified Fourteenth Amendment. In any event, the State Board of Education, by the state statute, has waived the application of the Eleventh Amendment.

State Defendants cannot use state law to frustrate the efforts of a federal court to remedy a constitutional violation. As the Detroit Board must, the State Defendants, the state officials responsible for education in Michigan, must conform their actions and allocate their funds consistent with the constitutional requirement to desegregate the Detroit schools. The State Defendants were not ordered to pay unappropriated funds, but were ordered to implement a remedy for their constitutional violations.

The *Rodriguez* case[4] and reasoning is not applicable. This is not a suit challenging the state educational finance system, rather this is the remedial phase of a school segregation case involving joint wrongdoers.

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[4] *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

The State Defendants, adjudicated wrongdoers, may not escape a remedy for school segregation by arguing that their partial financing of the desegregation plan is in contravention of state law. The remedial order carefully considered the pervasive state control of local education and the fact that the Michigan Supreme Court has consistently held that local school districts are mere agencies of the state. The cost allocation of the remedy is consistent with Michigan's pervasive control of education, the State Defendants' constitutional violation and the critical financial condition of the Detroit school system.

The Detroit school system has been hampered by a declining tax base, inflationary costs which have limited its ability to deliver current educational services, citizens who have the highest municipal tax burden in Michigan and the defeat of ten of the last eleven millage attempts to secure needed additional operating revenue, including three millage defeats in August and November, 1976. On these facts the District Court properly found that the Detroit Board could not bear the entire costs of desegregation because " . . . the very survival of an already bankrupt school system is at stake."

The educational components at issue here were developed, pursuant to the District Court's guidelines, by the Detroit Board and the State Board of Education over a period of time. The cost of these components is a function of the size of the Detroit system. Based on Detroit's 236,000 students and 12,000 teachers and administrators, the remedial reading component costs $19.49 a child; in-service training $204.50 a teacher or administrator; testing $2.28 a child; and counseling and guidance $17.16 a child.

As a practical matter, these components cannot be implemented in Detroit without the State Defendants' participation. Without components, the vestiges of segregation in Detroit cannot be eliminated.

ARGUMENT

I.

THE INCLUSION OF REMEDIAL PROGRAMS IN READING, IN-SERVICE TRAINING, TESTING, AND COUNSELING AND GUIDANCE IN DETROIT'S DESEGREGATION PLAN WAS CLEARLY WITHIN THE POWER OF EQUITY BECAUSE OVERWHELMING RECORD EVIDENCE ESTABLISHES THAT THEY ARE ESSENTIAL IN DETROIT TO ELIMINATE ALL VESTIGES OF SEGREGATION AND OVERCOME OBSTACLES TO DESEGREGATION.

Resolution of the issues now on appeal begins and ends with the record. On remand, the District Judge was urged to adopt a massive busing program in Detroit. Instead of doing so, he adopted a more realistic transportation program, and utilized other techniques of desegregation including changing attendance zones, leaving schools untouched that were in stabilizing neighborhoods, ordering magnet schools, and developing a system of city-wide open enrollment schools. Remedial programs in reading, in-service training, testing, and counseling and guidance were an integral part of this carefully devised desegregation plan.

Assisting the Court in developing the overall plan were three court appointed experts: Wilbur J. Cohen, Dean of the University of Michigan School of Education and former Secretary of Health, Education and Welfare; Frances Keppel, former United States Commissioner of Education; and John A. Finger, Professor of Education, Rhode Island College.

It is imperative that this Court understand how the four remedial programs, reading, testing, in-service training, and counseling and guidance came to be included in the Detroit desegregation plan as they were finally ordered by the District Court, what they actually are, and what they are designed to accomplish. The issue in this case is not the abstract question of whether a desegregation plan may include educational components absent a specific finding of a constitutional violation in educational programs. The issue is whether this record supports this District Judge's finding that the programs in question here

are necessary to eliminate all vestiges of segregation, overcome obstacles to effective desegregation and prevent resegregation in Detroit.

Segregation in the Detroit schools, found by the District Court and affirmed by the Court of Appeals and by this Court to have been caused by the State and the Detroit Board, has had many devastating consequences to black students. Unlike the South, where segregation resulted from notorious Jim Crow laws, segregation in Detroit was the result of an evolutionary process, contributed to by both state and local officials, co-defendants herein, which took place over a period of time. Not only did this process result in racial isolation for black children in a large number of schools, but there were other aspects of the process which have left the badges of segregation on these children. Courts have recognized that students attending segregated schools "have long been disadvantaged by the inequities and discrimination inherent in the dual school system". *Plaquemines Parish School Board* v. *United States,* 415 F.2d 817, 831 (5th Cir. 1969).

As a result of the inequities inherent in segregation, black students in Detroit's predominantly black schools did not receive the same educational benefits as white children in predominantly white schools. Just a few examples of these adverse effects of segregation suffered by many black students are the low achievement test scores (A 6), impaired reading ability (A 6), tracking (A 31, 37), disproportionate representation in special career programs (A 34), and a substantially higher dropout rate (A 51-53).

To eliminate these inherent inequities, these vestiges of school segregation, and to remove obstacles to effective desegregation, the District Court's remedial order provides for special reading programs, testing programs, and counseling and guidance programs. In addition, an in-service training program is included to sensitize school teachers to the needs of black students who have been the victims of such racial discrimination and to the problems of teaching in a desegregated setting.

The inclusion of these programs in Detroit's desegregation plan is entirely consistent with the historical power of equity "to

mould each decree to the necessities of the particular case", *Hecht* v. *Bowles*, 321 U.S. 329, 330 (1944), and to render a decree which will "eliminate the discriminatory effects of the past as well as bar like discrimination in the future", *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), and "eliminate all vestiges of state imposed segregation", *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), "root and branch", *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438 (1968).

The State Defendants' argument that the District Court exceeded its remedial powers by including these programs in reading, in-service training, testing, and counseling and career guidance in its plan must fail because these defendants:

A. Ignored the record support for the programs;

B. Misrepresented both their content and the function each is designed to perform in the process of remedying the violation of segregation, making desegregation a success and preventing resegregation;

C. Failed to understand the nature of segregation in Detroit schools, and the purpose of desegregation law; and

D. Misunderstood the governing remedial principles.

A. RECORD EVIDENCE SUPPORTS THE NEED IN DETROIT FOR REMEDIAL PROGRAMS IN READING, IN-SERVICE TRAINING, TESTING, AND COUNSELING AND GUIDANCE.

Contrary to the assertions of the State Defendants, the District Court did not usurp school board decisions, did not take over management of the Detroit schools, and did not include components in the plan simply to improve the overall quality of education.

The role that components came to play in the Detroit desegregation plan evolved as follows. The original plan submitted by the Detroit Board included thirteen educational components in addition to pupil reassignment. The Court then ordered the

State Defendants to submit a critique of the Detroit Board Plan. (PA 13a). At pages 38 and 39 of its critique, the State approved the inclusion eight of the proposed components as deserving "special emphasis in a desegregation plan".

> [W]ithin the context of effectuating a pupil desegregation plan, the in-service training, guidance and counseling, students' rights and responsibilities, school-community relations, parental involvement, curriculum design, multi-ethnic curriculum and co-curricular activities components appear to deserve special emphasis.

The State Defendants were in the forefront of supporting these components to desegregate Detroit schools until the State was required to pay its share of the cost.

Plaintiffs also responded to the Detroit Board's proposed plan by affirming the inclusion of these components to make the desegregation plan work and to eliminate the effects of segregation.

The following record evidence developed in over 76 days of actual trial time (41 days of violation hearings and 35 days of remedial hearings), supports the District Court's finding that remedial programs in reading, in-service training, testing, and counseling and guidance were necessary to eliminate the vestiges of segregation, to overcome obstacles to effective desegregation and to prevent resegregation. Upon review, the Court of Appeals affirmed these findings as "not clearly erroneous, but to the contrary, supported by ample evidence". *Bradley* v. *Milliken*, 540 F.2d 229, 241 (6th Cir. 1976); (PA 170a).

1. READING.

(a) **The Record Evidence.**

One of the devastating, adverse consequences of the segregation of Detroit schools, caused by the State and the Detroit Board, which the District Court has sought to eliminate in its remedial order is the unequal reading ability of many black students as compared to the ability of white students. Because of the process of segregation, by the eighth grade, black students in predominantly black schools were on the average of two or more

grade levels behind white students in predominantly white schools as measured by standard achievement test scores. There is absolutely no evidence in the record that such disparity resulted from some inherent inferiority of black children as a group relative to white children. Rather, as a group and on the average black and white children arrive in school with the same potential and much the same levels of tested achievement. Only thereafter, with the experience of school segregation, does this tested achievement disparity appear and grow (A 99-100). Because of these reading deficits, black students did not do well in other areas of education, because the ability to read is a prerequisite to the entire learning process. Consequently, teachers in predominantly black schools came to expect less of their students. This low teacher expectation in predominantly black schools because of the low achievements of their students caused a further deterioration in the black students' desire to learn (AR 18ar, P Dep Johnson X 5 §§ 31, 32; AR 20ar, P Dep Johnson X 6 p 11; AR 17ar, D X MMMM). Thus, failure of black students to read as well as their white counterparts resulted from the process of segregation in Detroit and formed the basis for the generally low achievement level of black students (AR 5ar-6ar, RV IX 1006-07; A 60-62).

The evidence from the remedial record established that a remedial reading program was absolutely essential to remove these vestiges of segregation in order to make desegregation work.

Dr. Robert Green, Dean of the School of Urban Studies, Michigan State University, testified as follows:

> I am also well aware of the fact that minority youngsters in a system . . . do lag significantly behind their white counterparts in reading skills . . . Racial segregation is a very key factor in the process . . . When we examined the data for the NAACP here, I believe, two, two and a half years ago, when we had firsthand awareness of that date, there was a significant discrepancy between the general achievements, specifically in the reading area, between black and white youngsters here in the City of Detroit. (A 61).

Plaintiffs' witness, Dr. Michael J. Stolee, now Dean of the School of Education at the University of Wisconsin, reemphasized the fact that black students who had been victims of discrimination often suffered the greatest difficulty in reading and, because of this fact, many desegregating school systems have concentrated on remedying the reading deficits of their black students. It was the opinion of this expert that a desegregation plan could not be effective without a remedial reading program (A 55).

Dr. Gordon Foster, Director, of the Florida School Desegregation Consulting Center at the University of Miami, emphasized the fact that reading programs are an important aspect in facilitating desegregation. Dr. Foster pointed out the relationship between the ability to read and the ability to test well, he also pointed out some of the teaching and disciplinary problems due to segregation caused reading deficits which surface when actual desegregation begins, and, if left unresolved, prevent any desegregation plan from succeeding. Dr. Foster testified:

> But when you throw children, especially at the advanced grades from widely different preparation backgrounds, children of considerably different achievement, teachers are in very dire straits on how to deal with a roomful of children that have very wide achievement ranges. And this is one of the perceptions that they have of being a most difficult problem. It's very obvious that if you have a child, for example, in the 5th or 6th grade who is reading at the 1st and 2nd grade level, that none of the subjects in that grade can he adequately cope with because reading is the foundation for the whole business. (A 56).
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> * * *
>
> Let me cite a quick example. We have an accepted program with one of the big high schools in Miami which is desegregated, Jackson High School, and they just had a finding that needs assessment which indicates that something like 70 percent of their pupils in the senior high school are reading at maybe the 4th or 5th grade level. Now, obviously, this becomes a very important disciplinary matter because the pupils sit there and they can't do anything. They can't relate to what's going on in the classroom. (A 57).

(b) **Decisions Of The Courts Below.**

The entire record testimony as to the essential need for a reading program to eliminate the vestiges of segregation in Detroit was brought into focus when the District Court set forth its reasons for including a remedial reading program in the Detroit desegregation plan.

> There is no educational component more directly associated with the process of desegregation than reading. Statistical data establish that minority youngsters lag significantly behind their white counterparts in reading skills, which in turn affects the ability of minority students to follow written instructions, succeed on aptitude tests, pass entrance examinations for colleges and universities and compete in the world of arts, sciences, occupations, and skills. Moreover, when such conditions persist, there is a direct effect upon the school environment. Students become disciplinary problems when in reality their problem is directly associated with an inability to conceptualize due to a lack of proper reading and communication skills. As a consequence, teachers and staff assume that such minority students are uneducable, thus further deteriorating the school environment for these students. To eradicate the effects of past discrimination, a remedial reading program should be instituted immediately to correct the deficiencies of those midway in their educational experiences. *Bradley* v. *Milliken*, 402 F.Supp. 1096, 1138 (E.D. Mich. 1975);(PA 72a).

The Court of Appeals affirmed the inclusion of a reading program in the Detroit desegregation plan, holding that reading programs are "essential to combat the effects of segregation" and necessary to provide the "achievement levels" required to overcome obstacles to desegregation. 540 F.2d at 241; (PA 170a-71a).

2. IN-SERVICE TRAINING.

(a) **The Record Evidence.**

Another inequity inherent in the process of segregation was that both black and white teachers assigned to predominantly black schools tended to have poor expectations of students

attending those schools (AR 10ar-12ar, RV XXXV 3805-06, 3814; A 38). The record established that in Detroit there is a direct relationship between a student's performance and his teacher's expectations, preceptions, attitudes, and behavior (AR 4ar-7ar, RV IX 988-93, 1033-35; A 38). In fact, the discrepancy of one to two years between black and white student achievement level at the eighth grade was partially the product of low expectations from teachers (AR 1ar-3ar, RV April 6, 1971 53-58) and also the substantial drop-out and truancy rates among black junior high school students attending segregated schools in Detroit (AR 21ar, P Dep Johnson X 6, p 24; A 63).

Dr. Charles Kearney, Associate Superintendent of Research and Administration of the Michigan Department of Education, and the State Defendants' own witness, stated on direct examination that in-service training was necessary to a desegregation plan:

> Well, I suspect when one undergoes a desegregation effort that you have the movement of a number of pupils from different areas of the city or different areas of the school districts. And it seems good judgment to prepare teachers, as well as other professional staff who are going to meet these children when they come in the school, to be prepared and ready to work with those children and hopefully end up with a successful experience. (A 88-89).

Dr. Stuart Rankin, Assistant Superintendent for Research for the Detroit school system, explained the need for in-service training in the area of teacher expectations:

> If I'm a white teacher who has been—or a black teacher, for that matter, who has been used to working only with black youngsters or only with white youngsters and my experience is limited to that extent and I may have, through my own background, certain prejudices or limitation, or in some other ways may not be as adequate to the job in a newly desegregated school situation as I might otherwise be . . . I am going to need to understand what happens when expectations are communicated to youngsters . . . It is true that . . . the extent to which the teacher communicates to the student that the teacher expects that the student will

learn well is an important variable in how the student feels about how well he is going to learn. And in turn, that is an important factor in how well he does indeed learn. (A 38).

Dr. Michael J. Stolee, Plaintiffs' witness, testified:

In my opinion, the most important single component that's in there is the section on in-service training. I have read the back of the document what the School Board has had to say, and it is my opinion that their statements reflect accurately, as I know it to exist on the national scene and that the program they are presenting makes sense. It would be a good way to handle it. (A 54).

Dr. Kearney, a State witness, Dr. Rankin, a Detroit Board witness, and Plaintiffs' witness, Dr. Stolee, each ranked in-service training as the most important component in the Detroit desegregation plan and essential to the operation of the plan. (Kearney (A 90); Rankin (A 38); Stolee (A 54)).

(b) **Decisions Of The Courts Below.**

Because record testimony established that an in-service training program is essential to prepare Detroit's faculty and other educational personnel to deal with the experiences that arise in a school system undergoing desegregation and to correct the negative effects on black students of segregation fostered pre-existing bias, lack of cultural understanding and low teacher expectations, the District Court reasoned and concluded:

A comprehensive in-service training program is essential to a system undergoing desegregation . . . All participants in the desegregation process must be prepared to deal with new experiences that inevitably arise . . . It is known that teachers' attitudes toward students are affected by desegregation . . . White and black teachers often have unhealthy expectations of the ability and worth of students of the opposite race. Moreover, it is known that teachers' expectations vary with socio-economic variations among students. These expectations must, through training, be re-oriented to ensure that academic achievement of black students in the

desegregation process is not impeded. A comprehensive in-service training program will ensure that all students are treated equally in the educational process. 402 F.Supp. at 1139; (PA 73a).

In affirming, the Court of Appeals stated:

The need for in-service training of the educational staff . . . is obvious. [In service training] is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. 540 F.2d at 241; (PA 170a).

3. TESTING.

(a) **The Record Evidence.**

Another consequence of the segregation caused by the State and the Detroit Board is the low achievement test scores of black students as compared to white students which lead to the grouping of black students in what the educational world refers to as tracking (A 35-37, 41-42).

Standardized tests have traditionally been used to measure achievement, and to classify and counsel students. These tests are heavily dependent on strong reading skills (AR 22ar-23ar, P Dep Johnson X 6, p 34-36; A 36, 41-42). These tests are couched in the language and vocabulary of the white middle class. In addition, as a consequence of segregation, black students in Detroit are unfamiliar with the subject matter of the tests. Consequently, testing, as a by-product of segregation, has retarded the progress of black students by tracking, misplacement and undereducating (AR 14ar-16ar, P Dep Drachler June 28, 1971, 113-17; AR 22ar, P Dep Johnson X 6, 31; A36-37, 41-42).

Record evidence supports the need for a revised testing program designed to deliminate these vestiges of segregation and to prevent their continuation.

Dr. Edward Simpkins, Dean of the School of Education at Wayne State University, verified that "we have had tracking systems built into the school systems and testing has been used as a device for segregating and isolating racial groups within the

schools". (A 31). Professor Margaret C. Ashworth, of the Wayne State University School of Education, also confirmed the fact that tests were culturally biased and resulted in the segregation of black children in various educational tracks. (A 36-37).

According to Professor Ashworth, the Detroit Board's testing component was "designed to prevent this type of segregatory effect". (A 37). Dr. Stuart Rankin described the way test procedures will be administered to ensure that new testing procedures will be nondiscriminatory:

> [T]hose people who give the tests and those people who interpret the results of those tests, under a desegregated school situation, should have some special training to make certain that the childrens' testing circumstances are just as perfect as they can be, that there is the appropriate readiness for taking the test that gives every advantage that is fair . . . that the test administration is done the way it ought to be. But more importantly that the interpretation and results of these tests are used properly, not to channel kids in a situation where they may be grouped with youngsters who perhaps aren't learning as well or we might get some re-segregation possibly. (A 39-40).

The State's witness, Dr. Charles Kearney, acknowledged that improper testing procedures could have an adverse effect on the desegregation effort:

> If test results were inappropriately used to categorize children into special education programs and most of those children happen to be black as a result of that kind of use, yes I think it would have certainly a discriminatory affect and it would have a negative affect, I'm sure on any kind of desegreation plan being implemented. (A 93).

(b) **Decisions Of The Courts Below.**

To ensure that desegregation will succeed, and to eliminate all vestiges of segregation, the testing program will have two goals: first, to eliminate any cultural bias from the tests themselves; and, second, to make certain that placement decisions based upon test results are no longer discriminatory.

Based upon the above record evidence, the Court recognized these desegregation goals when it wrote:

> The Detroit Board and State Board of Education are constitutionally mandated to eliminate all vestiges of discrimination, including discrimination through improper testing. 402 F.Supp. at 1142; (PA 78a).

The Court of Appeals affirmed the District Court's decision stating:

> The need for . . . development of non-discriminatory testing is obvious. . . . [Non-discriminatory testing] is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools. 540 F.2d at 241; (PA 170a).

4. COUNSELING AND GUIDANCE.

(a) **The Record Evidence.**

Another of the adverse consequences of the segregation of Detroit schools, caused by the State Defendants and the Detroit Board, which the District Court has sought to eliminate in its remedial order is the under-representation of black students in technical and vocational training programs and the disproportionately high absenteeism and drop-out rate of black students as compared to white students. (AR 8ar-10ar, RV XXXIII 3603-13, AR 13ar, R November 23, 1970, 70-72; AR 19ar-21ar, P Dep Johnson X 6, pp 15-16, 24; A 34, 59-60, 63).

The remedial record clearly establishes that a counseling and guidance program must focus on correcting these vestiges of segregation and, in addition, help students adjust to the inevitable pressures which develop in the desegregation process.

Charles Wells, Assistant Superintendent of the Detroit Public Schools, testified that the counseling and guidance component was needed to cope with new pressures created by "moving a significant number of students where new peer relationships have to be established to deal with disciplinary problems and to remedy Detroit's high drop-out rate among black children who have been retarded in their educational development by segregation in the Detroit system". (A 51-53).

Mr. Wells also testified that a revised counseling and guidance component must correct the effects of segregation on black children and eradicate previous counseling practices which stereotyped black children and discouraged them from entering into wide varieties of educational and career opportunities. (A 52). Mr. Wells highlighted the previously segregated black students' need for a revised counseling program:

> I have gone into some length about the adjustment problems. I think a second area relates to—particularly if we're talking about black students—the problems that are the consequence in many instances of past discrimination and segregation.
>
> Students usually choose pursuits, have an interest in education to the extent that either they or those around them have found those experiences to be to some degree successful in the past. We have many students who are in the black community who cannot look to parents, cannot look to relatives, who have been successful in a number of areas that are now open to trained people. It then becomes necessary for the school system to provide the kind of guidance that can assist the student in making an intelligent choice about a career and give that student some understanding that if he or she prepares themself to be sufficient to meet the qualifications within a particular career, there is the opportunity and possibility for them to exploit that experience in terms of meaningful employment". (RR XXI 153, 154).

Professor Margaret Ashworth graphically described the need for a guidance and counseling program to eliminate the effects of past segregation of black children in the Detroit system and to make certain that counseling and guidance will be nondiscriminatory when she said:

> [W]hat we are saying is that in order to correct the inequities for the students and right the wrongs of students that the person has to be retrained and that program has to be revamped . . . but what I am saying is that students have been counseled in or out of certain programs based on their race. If this had not been so the Aero Mechanics would not be 84 per cent white in a school system that is more than 70 per cent black. (A 34).

Professor Ashworth's reference to the Aero-Mechanics High School, a training ground for entry into the aviation industry, being a predominantly white school underscores Mr. Wells' point that there has been a failure in career counseling for black students.

No stronger support for the counseling and guidance component as being necessary in desegregating the Detroit system was given than by the State Defendants' own witness, Dr. Kearney. He testified that a counseling and guidance component was necessary to avoid stereotyping students based on race (A 95), and further stated:

> We support the notion of a guidance and counseling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis. (A 88).

(b) **Decisions Of The Courts Below.**

Based on this record, the District Court recognized that a counseling and guidance component was essential to eliminate "root and branch" all vestiges of segregation in the Detroit school system and to make desegregation work, and in doing so the Court wrote:

> School districts undergoing desegregation inevitably place psychological pressures upon the students affected. Counselors are essential to provide solutions to the many problems that result from such pressures. Moreover, the success of the vocational and technical schools created herein depends upon the efforts of counselors whose guidance is essential to students seeking a career. Counselors can accomplish much to shape and guide the academic experiences of students. They assist student self-development training possiblities available in the system. It will be essential that the counselors become fully acquainted with the vocational and technical offerings created herein. 402 F.Supp. at 1143; (PA 81a).

The Court of Appeals affirmed the District Court holding that ". . . counseling programs are essential to the effort to combat the effects of segregation". 540 F.2d at 241; (PA 170a).

5. INCONSISTENCIES AND MISREPRESENTATIONS OF THE STATE DEFENDANTS.

The schizophrenic argument of the State Defendants is illustrated by the fact that they have supported other components in the desegregation plan which are now in various stages of implementation. The inclusion of these components has never been appealed because the State Defendants were not asked to pay for them. The same rationale which supports the inclusion of programs not appealed by the State Defendants supports the inclusion of the four programs at issue here. It is hard to believe that the State Defendants are serious in suggesting that the reading, testing, in-service training, and counseling and guidance programs are not essential to remedying all vestiges of the past effects of segregation in Detroit and overcoming obstacles to effective desegregation.[5]

The hypocrisy of the State Defendants' appeal of this issue is further highlighted by their attempt to misrepresent to this Court the Plaintiffs' views as to the educational components. Plaintiffs never opposed the inclusion of educational components in the Detroit desegregation plan. At the remedial hearings, the Plaintiffs' two experts, Dr. Stolee and Dr. Foster emphatically supported these components. In addition, the Plaintiffs filed a Brief In Opposition To Petition For Writ of Certiorari. The State Defendants have taken out of context the statement of Dr. Foster that his pupil reassignment plan eliminated the segregation in Detroit and ignored his lengthy testimony as to the need for educational components as part of the plan to desegregate the Detroit school system. (A 55-58).

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[5] The Detroit Board does not understand the import of footnote 8 at page 11 of the States' Brief regarding vocational education. The Detroit Board has attempted in the past to develop a vocational program but was prevented from doing so during the course of this litigation because of the injunction against the construction of any schools. The Detroit Board's frustration was even more keen when, during the period of this litigation it watched the State consistently allocate federal funds for vocational education to school districts which were predominantly white.

B. THE FOUR NEW REMEDIAL PROGRAMS—THEIR RELATIONSHIP TO DESEGREGATION.

The concept of including these specialized remedial programs in a Detroit-only desegregation plan was developed by the Detroit Board and supported by the Plaintiffs and the State Defendants. These programs were not interjected by the Court and imposed upon reluctant school officials. The District Court merely set forth guidelines to be followed in developing each of these programs. Consistent with these guidelines, the detailed plans for the actual programs to be implemented were developed over a period of time by the Detroit Board working in some cases with the State Board of Education, and submitted to the Court for approval and incorporation into Detroit's desegregation plan. The reading program was approved on December 4, 1975, and the in-service training, testing, and counseling and guidance programs on May 11, 1976. (PA 146a).

1. CONTENT AND FUNCTION OF EACH PROGRAM.

(a) **Reading.**

The new reading program will provide remedial reading instruction to students at the high school level who have reading deficits which developed as a result of the inherent inequities of the segregated conditions in the Detroit schools. The new reading program will also instruct high school teachers how to teach remedial reading, because high school teachers are discipline oriented in their teaching rather than oriented toward reading instruction (A 57). The new reading program will also train middle school teachers in remedial reading techniques to facilitate the assimilation of sixth grade students who will be in middle schools for the first time due to the grade restructuring necessitated by desegregation.

The new reading program will train administrators, teachers, and para-professionals, at all grade levels, in ways to restructure their reading program to overcome segregation caused reading deficits, and to accommodate grade changes and the new pupil mixes resulting from the pupil reassignment program, magnet schools, the new area vocational centers, and city-wide schools. Parents will also be trained in methods with which they can help their children improve their reading and communication skills.

For the first time, trained reading specialists will be assigned to each senior high school. They will do two things. They will provide reading instruction directly to students with reading handicaps which developed as a result of the inequities of the segregated conditions in the Detroit schools. These reading specialists will also help high school teachers, who have never had training in remedial reading instruction, in methods of diagnosing and remedying segregation-caused reading deficits. For the first time, this same kind of instruction given at the high school level will also take place at the middle school level.

At the elementary school level, reading specialists will train elementary school teachers how to identify reading deficits early in a student's academic career, and how to remedy these deficits and thereby prevent the discrepancy between the academic achievement of black and white students at the eighth grade level. Then, all students can work together and progress together in all aspects of the desegregation process.

When the cost of this new remedial reading program is apportioned among Detroit's 236,000 students, the average cost is about $19.49 a child.

(b) **In-Service Training.**

The Detroit Public Schools will develop, implement, coordinate and monitor an in-service training program which will meet the unique needs of a school district undergoing desegregation. The program will concentrate its efforts in the areas of teacher expectations, crisis intervention and prevention, ethnic and racial awareness and human relations.

Teachers and other staff will be trained to understand the impact of their expectations on how they plan and teach their courses, and how their expectations effect the performance level of students who have varying racial, cultural and socio-economic backgrounds.

Crisis prevention and intervention programs are needed in a desegregating school system to deal with conflicts which may arise as a result of desegregation in and around the schools which may disrupt the educational programs of those schools. The new in-service training program will instruct staff and

teachers how to identify these potential problems so that hopefully they may be avoided, and how to handle them if they do in fact develop. The aim of the program will be total participation of all teachers and staff and students, and as much participation of parents as it is possible to obtain.

The new in-service training program will bring to students and staff an awareness and appreciation of racial and cultural differences. By so doing, teachers will develop an increased understanding and appreciation of the characteristics of the different racial, cultural and socio-economic groups and come to learn the important strengths of students from each group, and how to combine these in the classroom to achieve a total desegregated learning experience.

The new in-service training program will ensure that teachers, educational staff, students and parents are prepared to deal with the new experiences which inevitably arise as a result of a desegregation plan. Such training programs necessarily are extensive because there are about 12,000 teachers in the Detroit schools.

The cost of the desegregation in-service training program averages about $204.50 a teacher or administrator. This average cost does not take into account the large number of non-professional staff personnel who will also receive the benefits of this training.

(c) **Testing.**

Under the new testing program, all tests used in the Detroit schools will be reviewed to ensure that they are non-discriminatory and free of any cultural bias. If any tests are found discriminatory, they will be discontinued and new tests will be selected to replace them. In addition, there will be a re-examination of the use of individual psychological test results to guard against discriminatory placement of any child in any program.

All school staff will receive training in test administration procedures which ensure standardized and non-discriminatory treatment of the students when they are taking the tests. Staff will be trained in the proper interpretation of test results so that tracking will not result, students will not be unnecessarily pre-

cluded from entering particular programs, nor undue weight given to test scores in making judgments about pupil placement. In order to avoid tracking and resegregation, particular emphasis will be placed on instructing those who interpret test scores in the meaning of those scores and the limitations which should be placed on the use of these scores. Those who administer tests will learn the importance of communicating scores and the importance of teachers and counselors communicating their expectations of success to the student.

In addition to the above, the new testing program will provide for the evaluation of test results in order to monitor Detroit's desegregation efforts so that timely information may be developed and utilized by the school administration as to the strengths and weaknesses of the desegregation effort.

When the cost of revising and administering the new testing program is apportioned among Detroit's 236,000 students, the average cost is about $2.28 a child.

(d) **Counseling And Guidance.**

Under the new program, counselors will be trained to use the results of the new testing program, and will also receive training in career opportunities. They will then be able to guide each student, according to their own potential, into a rewarding career. Such a counseling program is expected to have a dramatic effect on lowering the high dropout rate among black students in the Detroit school system.

At the high school level, counselors will be relieved of clerical duties so they can devote their efforts to helping children adjust to the pressures of the desegregation process and spend more time with potential dropouts. Thus, counselors can work to ensure that students will be counseled into the magnet schools, area vocational centers and city-wide schools and open up the wide world of new career and educational opportunities for many of Detroit's black students who were denied exposure to such opportunities because of segregation.

A program comparable to that at the high school level will be initiated in the middle schools. It is at this stage of a student's education that the potential dropout develops. Contrary to the misrepresentations of the State Defendants, there will not be one

counselor in every elementary school. The new counseling and guidance program calls for only one counselor for every three elementary schools, because of the need to eradicate the vestiges of segregation at the earliest level. Some elementary school counseling is necessary because of the stresses caused by desegregation and also to expose these children and their parents to the educational opportunities available in magnet schools, at the sixth through eighth grade, and to numerous high school opportunities such as area vocational centers, city-wide schools and Cass Technical High School. The earlier these opportunities are made known to the child, the more successful will be these methods of racially mixing students.

When the cost of the counseling and guidance program is apportioned among Detroit's 236,000 students, the average cost is only $17.16 a child.

These new remedial programs cannot be characterized as the kind of "quality education" any school system should have. Nor can they be dismissed as expansions of existing programs. Each is specifically designed to meet the needs of children who have been victims of segregation and to overcome obstacles to effective desegregation.

At page 6 of their Brief, the State Defendants imply that these programs are not well documented and their costs excessive. This may be true of the original programs submitted by the Detroit Board on April 1, 1975. However, this is not true of the programs now before this Court for review because they have been developed by the State Board and the Detroit Board working with Wayne State University and other educational agencies, and then scrutinized by the Court and its monitoring commission before adoption and implementation.

2. DETERMINATION OF COST.

To arrive at the 5.8 million dollar figure which the State Defendants claim they should not be required to pay, the Court was equally precise. It ordered the Detroit Board to determine the highest amount spent in any year preceding desegregation on the reading, testing, and counseling and guidance and in-service training programs. The difference between the above figures and

the additional cost of replacing the old pre-desegregation programs with the new programs necessary to desegregate Detroit was $11,645,000. Payment of this additional cost was divided equally between the two Defendants (PA 146a, 147a). The State Defendants have never questioned the accuracy of this figure, only the requirement that they pay their share.

After the District Court's May 11, 1976 judgment (PA 145a) requiring payment by the State Defendants, they appealed, and for the first time raised the issue of the propriety of components in a desegregation plan. After extensive briefing and a review of the record, the Court of Appeals affirmed the inclusion of these four particular programs in a Detroit desegregation plan as being within the scope of the remedy and supported by ample evidence. 540 F.2d 229, 241; (PA 170a).

3. WRITINGS AND FIELD STUDIES SUPPORT THE NEED FOR REMEDIAL PROGRAMS IN A DESEGREGATION PLAN.

Current writings of educators, psychologists and sociologists, based upon studies and field observations, have reinforced the proposition that a school system undergoing desegregation cannot eliminate the vestiges of segregation "root and branch" unless remedial programs such as reading, in-service training, testing, and counseling and guidance are made a part of the desegregation plan.

For the convenience of the Court a listing of summaries of these current writings is set forth as a compendium to this brief at pages 90-98 hereinafter.

In July, 1976, the Educational Testing Service of Princeton, New Jersey, which is synonymous with educational testing and research in this country today, published two reports of a study entitled, "Conditions and Processes of Effective Desegregation".[6] Based on field research and surveys, the study recommends that, because of the effects of past segregation, and the "dramatic" impact of the "process of desegregation" on education programs,[7] the reading, testing, in-service training and counseling and guidance components described herein be included as essential components to an effective plan for school desegregation.

[6] *See* G. Forehand, M. Ragosta, and D. Rock, *Conditions and Processes of Effective School Desegregation*. Final Technical Report for U.S. Office of Education Contract OEC-O-73-6341. Princeton, N.J., Educational Testing Service, 1976; G. Forehand and M. Ragosta, *A Handbook For Integrated Schooling*. A report prepared for U.S. Office of Education Contract OEC-O-73-6341. Princeton, N.J., Educational Testing Service, 1976.

The commentators and the Princeton Testing Service's recent field studies unanimously support the finding of the Courts below that educational programs are essential to an effective desegregation plan in Detroit.

C. THE NATURE OF SEGREGATION AND THE PURPOSE OF DESEGREGATION.

When school desegregation law is traced to its origins in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), one finds that in determining whether a segregated education deprives black children of the equal protection of the laws, the Court stated, " . . . we must look instead to the effect of segregation itself in public education." *Brown* recognized that segregation is wrong because of the effect it has on the plaintiffs and their education. The basic underlying purpose of *Brown* is that these effects must be removed if the races are to be treated equally.

Seventeen years after *Brown*, this Court noted in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) that the process of desegregation had become more complex as it moved from rural areas to large cities with their many schools and population shifts. 402 U.S. at 14. The *Swann* court then addressed itself to the task of establishing guidelines for district courts to follow as they struggled to develop desegregation plans. The guiding principle was that " . . . all vestiges of state imposed segregation must be eliminated from the public schools". 402 U.S. at 15. While the central issue in *Swann* was pupil assignment, the Court acknowledged that there are other "aspects" of segregation in addition to student assignment and therefore other aspects to the process of desegregation in addition to pupil reassignment. 402 U.S. at 18.

[7] *See A Handbook For Integration, Ibid* at 4.; *also see*, pages 73-96 (Reading), 34-35 (Testing), 89-93 (In-Service Training), 53-56 (Counseling and Guidance).

In addition to recognizing that desegregation may be more than pupil assignment in order to eliminate all vestiges of past segregation, the *Swann* court also recognized that pupil reassignment alone may not be enough to counteract the "continuing effects of past school segregation". 402 U.S. at 28.

In *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974), this Court again spoke to the scope of the remedy in school desegregation cases:

> [B]ut the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

The Court of Appeals for the First Circuit did not construe language used by this Court in the context of excluding school districts from a remedy when they had not committed a violation, as limiting the basic remedial principles evolving in school desegregation law that desegregation plans must remove all vestiges of segregation rather than perpetuate them. As that Court pointed out, restoration is a "complex and widespread process". *Morgan* v. *Kerrigan*, 530 F.2d 401, 418 (1st Cir. 1976), *cert. denied*, 96 S.Ct. 2648 (1976).

The State Defendants argue that the only judicial remedy in a school desegregation case is pupil reassignment. Such an argument ignores this Court's position that desegregation must " . . . restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct". *Milliken* v. *Bradley*, 418 U.S. at 746, and ignores the recognition in *Swann* that desegregation can be more than pupil reassignment.

By defining the violation as "unlawful pupil assignment practices", the State Defendants attempt to narrow the remedy to pupil reassignment. However, after the violation hearings in Detroit the District Court found that:

> [B]oth the State of Michigan and the Detroit Board of Education have committed acts which have been causal

> factors in the segregated conditions of the public schools of the City of Detroit. 338 F.Supp. 582, 592 (E.D. Mich. 1971).

Once the violation of segregated conditions has been found, the scope of the remedy properly must include the elimination of all racial discrimination in that school system "root and branch". *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968).

Courts have acknowledged that discrimination can and does take many forms. Discrimination in the Detroit schools was not limited to pupil assignments. The proofs in this case established that as a result of segregation black children in Detroit's predominantly black schools did not receive the same educational benefits as white children in predominantly white schools. The reading level of many black children is lower than that of white children. Fewer black children are counseled into special programs, such as the Aero-Mechanics High School, and the dropout rate is substantially higher for black students than white students. Testing procedures have been discriminatory and often resulted in tracking. These facts are evidence of the effects of segregation in Detroit.

The components now in dispute are one part of an equitable remedy designed to eliminate all of the vestiges of segregation. As the conditions these components are designed to correct are inherent in segregation, they are a proper part of the remedy of desegregation. Without them, there can be no effective remedy for the segregation found to exist in Detroit.

D. THE TRADITIONAL RULES OF EQUITY GOVERN DESEGREGATION REMEDIES.

The State Defendants' argument that the only remedy available is pupil reassignment is based on the language in *Swann* and *Milliken* that the nature of the violation determines the scope of the remedy.

Swann simply tells us that while it is within the broad discretionary powers of school authorities to do voluntarily many things to correct segregation in the schools, absent a finding of the constitutional violation of segregation, a federal

court would not have the authority to include them in a desegregation plan. Both the State Defendants and the Detroit Board have been found guilty of violating the constitutional rights of Detroit school children. Therefore, the District Court had the broad traditional powers of equity to order into effect a plan which includes programs specifically designed to eradicate all vestigates of segregation and to protect its order by including programs designed to insure that the plan will succeed.

The State Defendants analogize the District Court's finding at the remedy stage that educational components are necessary with the previous District Court finding that the Detroit school system could not be desegregated within Detroit. They then point out that this Court reversed a metropolitan plan. However, this Court reversed because it found that the District Court imposed the remedy on suburban school districts which at that point had not been found to have committed any violation:

> To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court. *Milliken* v. *Bradley*, 418 U.S. at 745.

The analogy with *Milliken* fails because implementation of the remedy of the educational components is the responsibility of the two parties who committed the violations.

Swann and *Milliken* emphasize this Court's view that a court may not impose a remedy on a party which has not committed a legal wrong. They do not speak to the issue of the scope of the remedy equity may impose on parties found to have committed the violation of segregation. For this one must look to the traditional powers of equity.

This Court in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), determined that school desegregation remedies should be fashioned and effectuated by the local courts and directed these courts to apply traditional equitable principles in shaping a remedy to "effectuate a transition to a racially non-discriminatory school system". 349 U.S. at 300-01.

Swann reaffirms that courts must utilize their "historic equitable remedial powers" and that federal legislation does not restrict the power of the court to remedy violations of the Fourteenth Amendment. 402 U.S. at 16. Each of these cases relies on the language used by Mr. Justice Frankfurter writing for the Court in *Hecht* v. *Bowles*, 321 U.S. 329, (1944), a non-discrimination case, to describe the nature of equitable decrees in a discrimination case:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-30.

Thus, once a violation has been found, courts have broad remedial powers. The breadth of these powers is illustrated by the following cases wherein remedies designed to eliminate all of the effects of discrimination and to restore plaintiffs to the fullest possible extent have received judicial approval.

Louisiana v. *United States*, 380 U.S. 145 (1965) was a voting rights case. Not only was the interpretation test invalidated, but this Court approved the District Court's order requiring the complete re-registration of all voters in order to root out all vestiges of discrimination. In affirming the remedy devised by the District Court, this Court commented on the scope of the remedial power of equity:

> We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.
>
> * * *
>
> The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws,

> policies, and traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case to hear any evidence of discrimination in other parishes and to enter such orders as justice from time to time might require. 380 U.S. at 154, 156.

The components were included as a form of equitable relief to rectify the harm done by past discrimination and are analagous to the relief granted by the District Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), when absent any statutory grant of authority other than to order "any other equitable relief as the court deems appropriate", the court ordered seniority status retroactive to the date of employment for denial of employment due to race. In *Franks*, the violation was discriminatory hiring practices, not a discriminatory seniority system. This Court's affirmance was a recognition that by including such language Congress intended to vest broad equitable discretion in the district courts to grant "make whole" relief. Surely, if courts have such power to rectify a statutory violation, could the remedy be less when a constitutional violation is involved?

In devising desegregation plans, courts have applied equitable principles and have not limited relief of segregation to pupil reassignment. They have rendered decrees designed to eliminate the effects of past segregation and to prevent the continuation of discriminatory practices.

In *Placquemines Parish School Board* v. *United States*, 415 F.2d 817 (5th Cir. 1969), the District Court's desegregation plan included remedial programs for black students who would be transferring to formerly all white schools. On appeal these programs were approved because they eliminate effects of segregation inherent in a dual school system.

> The remedial programs, ordered by the district court, are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by *the inequities and discrimination inherent in the dual school system*. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion. 415 F.2d at 831 (emphasis added).

The trial court's plan also included such details as the repairing of locks and windows, the time schools should open, reinstitution of the school lunch program and bookmobile service, etc. All of these programs were affirmed on appeal as a just exercise of the court's discretion. While affirmance of these latter programs was induced in large part because defendants had openly opposed desegregation, affirmance of the remedial programs was not based on the hostility of school officials, but rather "inequities and discrimination inherent in the dual school sytem".

Circuit Judge Wisdom reaffirmed the Fifth Circuit's position that remedial programs were necessary to correct the effects of segregation in *George* v. *O'Kelly*, 448 F.2d 148 (5th Cir. 1971). *O'Kelly* involved the use of Title I funds and was remanded to the district court with the following instructions:

> The court should consider whether achievement grouping or remedial programs during the regular school year result in racial segregation within the school. If so, the court should inquire whether this results from the county's provision of relatively inferior education to the black community in the past . . . Also, if the court finds that black children have a lower educational achievement level because of inferior education to the black community in the past, it should consider whether the board's allocation of Title I funds comports with its duty to overcome any special educational deprivation of black children due to past discrimination. . . . The purpose of Title I of the Elementary and Secondary Education Act of 1965 is congruent with the affirmative duty of the board to take appropriate action to overcome any effects of past racial discrimination. 448 F.2d at 150.

Not only are these four programs within the scope of the remedy because they are necessary to cure the effects of segregation, but also because they promote effective desegregation.

Magnet schools in desegregation plans have the stamp of judicial approval as a desegregative tool. *Morgan* v. *Kerrigan*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 96 S. Ct. 2648 (1976); *Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699,

764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). In approving the use of a magnet school in a desegregation plan the *Hart* court stated:

> From *Brown II* on, the affirmative duty of school boards to root out the dual system of education has meant more than merely allowing black children into hitherto closed white schools. 512 F.2d at 54.

Special language programs have been approved if they remove obstacles to effective desegregation. *Keyes* v. *School District No. 1, Denver, Colorado*, 521 F.2d 465, 482 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

In devising an equitable remedy to correct the constitutional violation of segregated schools in Detroit, the District Court had the power and the duty to eliminate all vestiges of segregation by including in Detroit's desegregation plan remedial reading programs and revisions in testing procedures and counseling and guidance programs. In addition, the District Judge had the power to take these steps to ensure that the plan will work and also to include an in-service training program for teachers faced with the demands of desegregating a previously segregated school system.

The programs of reading, in-service training, testing, and counseling and guidance in the Detroit plan are remedies designed to restore, to make whole, to eliminate the effects of the segregation found to exist in Detroit and to remove obstacles to effective desegregation. These remedies are distinguishable from a pupil reassignment remedy rejected by this Court in *Austin Independent School District* v. *U.S.*, 45 U.S.L.W. 3413 (12-7-76), because the Austin plan exceeded the constitutional obligation to restore the students to the position they would have had but for the school authorities' failure to fulfill their constitutional obligations.

E. THERE IS NO CONFLICT WITH OTHER JURISDICTIONS.

Keyes v. *School District No. 1, Denver, Colorado*, 521 F.2d 465 (10th Cir. 1975) is easily distinguished because it does not hold

that a segregation remedy must be restricted to pupil reassignment. On the contrary, the *Keyes* court recognized that the district court could require the schools to help Hispanic school children learn English so they could learn other basic subjects and that to do so would remove an obstacle to effective desegregation. 521 F.2d at 482. The Court then remanded "for a determination of the relief, if any, necessary to ensure that Hispanic and other minority children will have the opportunity to acquire proficiency in the English language." 521 F.2d at 483.

What the *Keyes* court did object to was an elaborate plan extending to "matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, noninstructional service and community involvement", and including such matters as education for three-year olds and adults and clothing for poor children. 521 F.2d at 480-81. In rejecting this so-called Cardenas Plan the Court stated:

> [B]ut the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. *Instead of merely removing obstacles to effective desegregation*, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far. 521 F.2d at 482 (emphasis added).

The facts of this case distinguish it from *Keyes*. The four programs described in prior sections of this brief are directly related to remedying the effects of past segregation and removing obstacles to effective desegregation. Furthermore, the federal judiciary has not taken over the operation of the Detroit school system, instead the Detroit Board, later assisted by the State Board, proposed and developed these programs solely "to eliminate the vestiges of segregation" and to overcome "obstacles to effective desegregation".

F. CONCLUSION.

A desegregation plan may include more than pupil reassignment. The power of a court to order remedial programs when the

constitutional violation of segregation has been found has gone unquestioned until the State of Michigan, as co-defendant in this action, was ordered to pay for part of these programs. The four programs at issue are directly related to desegregation. They are reasonable, feasible and workable. They do not constitute an abuse of discretion by the District Court.

The State Defendants worked with the Detroit Board in developing some of these programs without appealing their legal propriety. Only after the District Court's Judgment of May 11, 1976 (PA 145a) requiring them to pay one-half of the cost of implementing the four programs here at issue did these defendants raise this question as one more ground for this Court to find that the State will not have to bear a part of the cost of remedying the segregation which it helped create.

The State Defendants have cited no cases which hold that once a court has determined that schools are segregated it cannot require the parties who caused that segregation to participate in remedying that violation. No separate finding of a constitutional violation in educational programs is necessary. A remedy to correct the constitutional violation of segregated schools properly may include these four remedial programs which have been specifically designed to correct conditions brought about by the inequities and discrimination inherent in a segregated school system and to overcome obstacles to effective desegregation.

The Court of Appeals did not err in holding that the District Court did not exceed its remedial powers. The evidence at each stage of this proceeding justifies the District Judge's finding that these four components are necessary to remedy the effects of past segregation, make desegregation succeed and prevent resegregation in Detroit.

II.

WHERE THE STATE DEFENDANTS HAVE BEEN ADJUDICATED TO HAVE VIOLATED THE FOURTEENTH AMENDMENT RIGHTS OF DETROIT SCHOOL CHILDREN, THE TENTH AMENDMENT MAY NOT BE INVOKED AS A BAR TO REMEDYING THE CONSTITUTIONAL VIOLATION.

This litigation, pending since August 18, 1970, has been before two District Judges, the Court of Appeals for the Sixth Circuit on at least six occasions and has been the subject matter of a decision by this Court. The State Defendants have never raised or argued that the Tenth Amendment bars any remedial relief being levied against the State Defendants, until their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 20-21, filed on September 24, 1976. By waiting more than six years and numerous court proceedings to raise this alleged defense, the State Defendants have precluded consideration of this issue by the courts below. Therefore, this Court, consistent with its general policy of refusing to hear issues raised for the first time before it, should refuse to consider the Tenth Amendment argument of the State Defendants. *Hormel* v. *Helvering* 312 U.S. 552, 556-57 (1940); *Anderson* v. *United States*, 417 U.S. 211, 217 (1974); *Adickes* v. *S. H. Kress & Company*, 398 U.S. 144, 147 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958); *Husty* v. *United States*, 282 U.S. 694, 701-02 (1931).

Additionally, this Court should not consider the State Defendants' Tenth Amendment argument that principles of federalism preclude prospective injunctive and incidental monetary relief redressing violations of Fourteenth Amendment rights as said argument has no foundation in any decision ever rendered by this Court.

The express language of the Tenth Amendment refutes this argument:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The State Defendants have ignored the following language from the Fourteenth Amendment:

> No State . . . shall *deny to any person within its jurisdiction the equal protection of the laws*. (emphasis added).

Almost one hundred years ago this Court, in *Ex parte Virginia*, 100 U.S. 339 (1880), established that the Fourteenth Amendment limits the reservation of powers contained in the Tenth Amendment. In upholding the indictment of a state judge, under a federal criminal statute prohibiting the exclusion of a juror, in a state court, because of his or her race, this Court stated:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State's sovereignty. No law can be, which the people of the State have, by the Constitution of the United States, empowered Congress to enact.
>
> . . . It is said that selection of jurors for courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. *But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.* 100 U.S. at 346 (emphasis added).

See Mitchum v. *Foster*, 407 U.S. 225, 238-39 (1972); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).

The States, in ratifying the Fourteenth Amendment, approved this limitation of state authority. It is, indeed, ironic that

the State Defendants now attempt to repudiate that which was agreed upon by the States over a hundred years ago.

In *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976), reaffirming *Ex parte Virginia, supra* this Court commented upon the limitation on state sovereignty that is imposed by the Fourteenth Amendment:

> As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their authority.
>
> * * *
>
> The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to the treatment of private individuals. Standing behind the imperative is Congress' power to "enforce" them "by appropriate legislation". 96 S. Ct. at 2670.

Obviously, the Fourteenth Amendment specifically prohibits segregation by race in the schools. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Cooper* v. *Aaron*, 358 U.S. 1, 6-7 (1958); *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683, 687 (1963).

The State Defendants, apart and separate from the Detroit Board, have been found guilty of being a substantial cause of the segregation found to exist in the Detroit school system. *Bradley* v. *Milliken*, 338 F. Supp. 583 (E.D. Mich. 1971); *Bradley* v. *Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973); *Milliken* v. *Bradley*, 418 U.S. 717, 725-28, 746 (1974). In *Hills* v. *Gautreaux*, 425 U.S. 284, 298 n. 13 (1976), this Court interpreted *Milliken* by unanimously stating ". . . [T]he State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 U.S. at 734-735, n. 16 . . ." *See Bradley* v. *Milliken*, 540 F.2d 229, 234 (6th Cir. 1976).

Given the established Fourteenth Amendment state violation here, the Tenth Amendment, or a claim of federalism, cannot bar the remedial relief which is necessary to eradicate and eliminate the constitutional violation of the State Defendants.

The fact that the Tenth Amendment cannot constitute a bar to remedying a violation of the Fourteenth Amendment was recognized in *Bradley* v. *School Board of Richmond, Virginia*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided court*, 412 U.S. 92 (1973) where the Fourth Circuit failed to find a constitutional violation on behalf of the Commonwealth of Virginia. The Fourth Circuit made it clear that if a violation of the constitutional rights of the Richmond school children had been found against the Commonwealth, as is the case in Detroit, the Tenth Amendment would not bar the Court from requiring the Commonwealth of Virginia to remedy a constitutional violation:

> If the state's near plenary power over its political subdivisions 'is used as an instrument for circumventing', *Gomillion, supra*, at 347, 81 S. Ct. at 130, the Fourteenth Amendment equal protection right of blacks to attend a unitary school system, then the Tenth Amendment is brought into conflict with the Fourteenth, and it is settled that the latter will prevail. *Gomillion, supra*. 462 F.2d at 1068-69.

See United States v. *State of Missouri*, 515 F.2d 1365, 1372 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975).

The case of *Rizzo* v. *Goode*, 423 U.S. 362 (1976) does not support the State Defendants. In *Rizzo* this Court reversed a holding that required city officials to implement internal procedures within the Philadelphia Police Department because there was no finding of any constitutional violation by those officials. In making that distinction, this Court stated:

> Respondents, in their efforts to bring themselves within the language of *Swann*, ignore a critical factual distinction between their case and the desegregation case as decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrative and school board members who had in their employ a small number of individuals, which later on their

> own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their *own* conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. 423 U.S. at 377.

Based upon their failure to acknowledge this distinction in *Rizzo*, the State Defendants argue that under the Michigan Constitution of 1963 and various state laws, the State Defendants are, as a matter of law, prohibited from appropriating state funds to pay for the remedy that is necessary to vindicate the constitutional rights of the Detroit school children. To accept this argument would effectively allow states, who had unquestionably violated the Fourteenth Amendment, to hide behind state law in order to deprive innocent children of their remedies. State law cannot be invoked to frustrate the spirit and purposes of the Fourteenth Amendment. *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971); *Louisiana* v. *United States*, 380 U.S. 145, 154-56 (1965).

A similar attempt to circumvent and nullify the provisions of the Fourteenth Amendment was rejected by this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) when it overturned the Alabama Legislature's attempt to disenfranchise black voters:

> If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fourteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by the respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of re-alignment of political subdivisions. " It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." 364 U.S. at 345 (citation omitted).

Gomillion clearly refutes the State Defendants' attempt to shield themselves behind principles of federalism while violating the Fourteenth Amendment rights of the Detroit school children. If the State Defendants are allowed to insulate themselves from a remedy, by hiding behind provisions of the Michigan Constitution of 1963, any state would be able to nullify the commands of the Fourteenth Amendment that no citizen be denied equal protection of the laws. Such attempts have always been rejected in school desegregation cases. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

The State Defendants' reliance on *National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976), holding that the Fair Labor Standards Act could not be broadly applied to state employees consistently with the Tenth Amendment, is misplaced.

Here, the District Court's Order was not an infringement upon "functions essential to separate and independent existence" of state governments, as in *National League of Cities*, but was carefully measured to effectuate compelling national policy.[8]

Indeed, it is the character of the national policy involved which provides the cogent reason for the inapplicability of the Tenth Amendment. Whereas, in *National League of Cities*, this Court was dealing with statutory rights, this case involves constitutional rights. No reading of the language of the Tenth Amendment can support an interpretation which reserves to the states the power to withhold compliance with the constitutional guarantee of equal protection of the laws.

This Court, in *National League of Cities*, expressly declined determination of whether "different results might obtain if Congress seeks to affect integral operations of state governments by exercising power granted it under such sections of the Constitution as . . . the Fourteenth Amendment." 96 S. Ct. at 2474. In *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976), this Court expressly

[8] In *National League of Cities*, the Court expressly reaffirmed its holding in *Fry* v. *United States*, 421 U.S. 542 (1975), wherein the wage and price controls, imposed by the Economic Stabilization Act, were held to be a minor intrusion of the state's sovereignty and not prohibited by the Tenth Amendment.

recognized that Title VII of the Civil Rights Act of 1964 could be constitutionally applied to the states. *See United States* v. *State of New Hampshire*, 539 F.2d 277 (1st Cir. 1976).

On October 28, 1976, the Court of Appeals for the Third Circuit in *Usery* v. *Allegheny County Institution Districts*, 544 F.2d 148 (3d Cir. 1976), sustained the Equal Pay Act, distinguished *National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976), and held that Congress possessed the power, under Section 5 of the Fourteenth Amendment, to prohibit discrimination on the basis of sex. The Third Circuit said:

> We note at the outset that in *National League of Cities* the plurality opinion expressly disclaimed any intention of ruling upon the constitutionality of the exercise of Congressional authority against the States pursuant to Section 5 of the fourteenth amendment. Four days later the Court unanimously sustained the exercise of such power in *Fitzpatrick* v. *Bitzer*, U.S. , 96 S. Ct. 2666, 49 L. Ed. 2d (1976). In *Fitzpatrick* it upheld the constitutionality of the 1972 extension of Title VII of the Civil Rights Act to state and local governmental employees. The latter statute prohibits sex-based employment discrimination, and *Fitzpatrick* involved such a claim. Expressly referring to *National League of Cities, at , 96 S. Ct. at 2467, the Court made it perfectly clear (1) that Congress has Section 5 Fourteenth Amendment power to prohibit sex discrimination in employment, and (2) that such power, despite the Tenth Amendment, extends to the state as an employer.* 544 F.2d at 155.

Accord, *Usery* v. *Dallas Independent School District*, 421 F.Supp. 111 (N.D. Tex. 1976); *Usery* v. *Board of Education of Salt Lake City*, 421 F.Supp. 718 (D. Utah, 1976); *Harris* v. *Commonwealth of Pennsylvania*, 419 F.Supp. 10 (M.D. Pa. 1976).

Thus, the lower courts have recognized that *National League of Cities* did not hold that the Tenth Amendment restricted Congress' right to enforce the Fourteenth Amendment against the states. This litigation, involving Detroit school children, has been brought pursuant to 42 U.S.C. §§1981, 1983 and

2000d. These statutory provisions have been enacted by Congress pursuant to the Fourteenth Amendment. The Tenth Amendment does not and cannot prohibit or impede the vindication of the constitutional rights of Detroit school children.

The fact that constitutional rights, as guaranteed by the Fourteenth Amendment, supersede principles of federalism and the Tenth Amendment, was reaffirmed by this Court in its recent decision in *Elrod* v. *Burns*, 96 S. Ct. 2673 (1976) where the Mayor of Chicago had subjected public employees to discharge if they refused to join the Democratic Party. Responding to the municipal defendants' contention that the federal courts could not interfere, due to principles of state sovereignty, in the operation of the executive level of state or city governments, this Court said:

> More fundamentally, however, the answer to petitioners' objection is that there can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power. And our determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document. 96 S.Ct. at 2679.

The absurdity of the State Defendants' federalism-Tenth Amendment argument is obvious. The State Defendants, like the defendants in *Elrod, supra,* do not have the power to violate the Fourteenth Amendment rights of the school children of the City of Detroit and the Constitution does not provide the State Defendants with the power to escape the remedy. The State Defendants have caused the wrong suffered by these children and the State Defendants must therefore share in the costs of the remedy.

III.

NEITHER THE ELEVENTH AMENDMENT NOR DECISIONS OF THIS COURT PREVENT FEDERAL EQUITY JURISDICTION FROM ORDERING STATE DEFENDANTS WHO HAVE BEEN FOUND GUILTY OF DE JURE SEGREGATION TO FINANCE PART OF THE IMPLEMENTATION OF A PLAN OF DESEGREGATION.

The decisions of this Court concerning the enforcement of school desegregation requirements from *Brown* through *Milliken* and up to the present day have one common predicate: given a constitutional duty of equal protection and a finding of a violation thereof by state action through state officials,[9] there is a consequent remedial obligation under the Fourteenth Amendment. The fact that state officials with state-wide authority are involved with the violation certainly does not alter the requirement for a remedy or excuse those officials from the remedy.

The argument of the State Defendants and the *Amici* relative to an alleged Eleventh Amendment bar to financial assistance in the implementation of the Detroit school desegregation plan was apparently written by those who have not read the record in this case. The argument ignores the fact that the State Defendants have been found guilty of *de jure* acts of segregation within Detroit; misapprehends the equitable nature of the remedial phase of a Detroit-only desegregation plan; and mischaracterizes the ancillary financial consequences of the injunctive relief ordered below against two constitutional wrongdoers.

Throughout the Brief of the State Defendants there is one constant theme with several variations: the lower courts do not have the authority to include the State Defendants in a remedy, nor to prevent a constitutional tragedy in Detroit. This is not true. The legal genesis of school desegregation remedies, sound

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[9] A metropolitan remedy was not approved in *Milliken* v. *Bradley*, 418 U.S. 717, 752 (1974) because there was no finding of any violation involving the suburban school districts. However, here there has been a specific finding of a constitutional violation committed by the State Defendants.

logic and settled law dictate that this is not a proper case for an Eleventh Amendment jurisdictional prohibition.[10]

A. THE INJUNCTIVE RELIEF ORDERED BELOW IN A DESEGREGATION CASE IS NOT PROHIBITED BY THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT.

U.S. 651 (1974), for the proposition that the Eleventh Amendment prevents their ancillary financial participation in remedying violations of the Constitution is misplaced.

The essence of the argument presented by the State Defendants is not novel. It is often made by state officers in an attempt to frustrate remedial orders of federal courts in the area of school desegregation. *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 318 F. Supp. 786 (W.D. N.C. 1970). This argument consistently has been laid to rest as quickly as it has been raised. *Cooper, supra; Griffin, supra; Swann, supra.*

Although this Court has, on occasion, recognized the immunity of states from suits involving *direct* actions against governmental funds or property, when brought for the comp-

[10] The State Defendants have been parties to this lawsuit since its institution in 1970. Petitioner State Defendants specifically urged an Eleventh Amendment bar to their inclusion in the previously proposed metropolitan remedy in their Brief at 41-46 submitted in the October Term, 1973. This Court subsequently rendered its decision in *Milliken, supra*, 418 U.S. 717 (1974), remanding the case to the District Court for a Detroit-only remedy. This Court made no comment concerning the arguments urging an Eleventh Amendment jurisdictional bar to including the State Defendants in that Detroit-only remedy, which is now the subject of this appeal.

lainants' personal benefit,[11] this Court has not deemed the Eleventh Amendment a serious impediment to judicial action when the protection of compelling constitutional guaranties has been an issue. *See, e.g., Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842 (1824); *Graham* v. *Folsom*, 200 U.S. 248 (1906); *Ex parte Young*, 209 U.S. 123 (1908).

The relief ordered herein for the vindication of constitutional rights was the educational components designed to eliminate the vestiges of segregation, not, as the State Defendants and *Amici* have contended, the direct payment of unappropriated funds from the state treasury. It is conceded that the implementation of each component in the desegregation plan will cost the Detroit Board and State Defendants money which might otherwise not have been spent. *See Evans* v. *Ennis*, 281 F.2d 385, 392 (3d Cir. 1960). However, this Court noted in *Edelman* v. *Jordan*, 415 U.S. 651 (1974) that:

> Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*. 415 U.S. at 668.

The evolution of the above-quoted *Edelman* rule can be traced through a number of prior decisions of this Court. *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203, 220 (1873), was the first of the

[11] *See, e.g., Louisiana* v. *Jumel*, 107 U.S. 711 (1883) (*mandamus* suit against the state in its political capacity by bondholders to compel specific performance by state officers, who had no contract relations with the bondholders, to act in derogation of the new state constitution; change the general administration of state finances and thus make direct payment of a judgment from the treasury); *Great Northern Life Insurance Co.* v. *Read, Insurance Commissioner*, 322 U.S. 47 (1944) (suit against state officials to recover taxes); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945) (suit against state officials for tax refund). These cases are relied upon heavily by State Defendants, along with *Hans* v. *Louisiana*, 134 U.S. 1 (1890) which involved a suit for *direct* payment from the state treasury of a judgment. *Jumel, supra* involved the state in its political, not its governmental capacity. Plaintiffs sought a money judgment by asking for a change in the general administration of state finances. This Court found this was "not. . . the ordinary form of judicial procedure . . ." 107 U.S. at 722. *Hans, supra*, did not contemplate the violation of the Fourteenth Amendment. Furthermore in deciding *Hans*, this Court clearly did not preclude suits by citizens of the state against state *officers* where claims arise under the Constitution. *Cf. Fitzpatrick* v. *Bitzer*, 96 S.Ct. 2666 (1976).

post Civil War cases in which a suit against a state officer was challenged as one against the state itself in violation of the Eleventh Amendment. The Court rejected this argument, asserted jurisdiction and enjoined the Governor of Texas from transferring land which the state had placed in a school fund by virtue of a new state constitution.

In *Smyth* v. *Ames,* 169 U.S. 466 (1898), this Court unanimously enjoined the Nebraska State Board of Transportation from hearing any complaint against the various railroad companies for violations of a state railroad rate law. In disposing of the Eleventh Amendment argument, this Court stated:

> It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State . . . 169 U.S. at 518-19.

See Reagan v. *Farmers' Loan and Trust Co.,* 154 U.S. 362 (1894).

In *Ex parte Young,* 209 U.S. 123 (1908), this Court ruled that the challenged legislation from the State of Minnesota violated the Fourteenth Amendment. In sustaining an injunction against the State Attorney General from enforcing the unconstitutional act, this Court rejected an Eleventh Amendment defense on the grounds that:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. 209 U.S. at 155-56.

The doctrinal development embodied in *Young* liberalized the principles governing suits against state officers in that the substantive rights guaranteed by the Fourteenth Amendment were accorded broad federal judicial protection. *See* C. Jacobs, The Eleventh Amendment and Sovereign Immunity, 143 (1972). The limitations of the Fourteenth Amendment guarantees are

upon state action. Judicial implementation of these guarantees in suits against state officers would present a doctrinal dilemma if the Eleventh Amendment presented an across-the-board jurisdictional bar to suits against State Defendants. *See Prout* v. *Starr,* 188 U.S. 537, 543 (1903); *Ex parte Virginia,* 100 U.S. 339, 345-48 (1880).

The doctrinal genesis of *Ex parte Young* was followed in *Home Telephone and Telegraph Company* v. *City of Los Angeles*, 277 U.S. 278 (1913), where the Court in discussing the extent of the Fourteenth Amendment, stated:

> . . . That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. 227 U.S. at 288.

In *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964), which involved the closing of public schools and the operation of an alternative system of all white private schools, Justice Black speaking for a unanimous Court, summarily dismissed the Eleventh Amendment argument by stating:

> *It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment,* and therefore should be dismissed. The complaint, however, charged that the state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled long since *Ex Parte Young,* [citation omitted], that *suits against state and county officials* to enjoin them from invading constitutional rights are *not forbidden by the Eleventh Amendment.* 377 U.S. at 228 (emphasis added).[12]

[12] There can be no doubt that in *Griffin* the State was clearly implicated. All parties to the litigation treated the suit as one against the state. *See* Briefs of Counsel, 12 L.Ed.2d at 1105-09. In *Griffin* the reopening of the schools presumably would have involved some state funds since other public schools received state support. 377 U.S. at 223. Indeed, the Attorney General of Virginia presented a 12-page argument that the suit, brought to enjoin the school board, other agencies and certain officers from refusing to maintain and operate an efficient system of free public schools, was a proceeding against the state barred by the Eleventh Amendment. C. Jacobs, The Eleventh Amendment and Sovereign Immunity, 156 (1972).

The foregoing Eleventh Amendment line of cases culminated in *Edelman* v. *Jordan*, 415 U.S. 651 (1974)[13] where this Court distinguished between a legally cognizable prospective injunctive relief directed toward the state to conform its actions to a constitutional mandate as opposed to a retroactive money judgment against the state treasury:

> It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule . . . 415 U.S. at 668.

In recognizing the difference between a prohibited retroactive direct money judgment and a permissible prospective injunctive remedy, this Court acknowledged that orders such as those entered in *Ex parte Young*, *supra*, and subsequent cases had, in fact, substantial impacts on state revenues.

> The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. [Citations and discussion omitted]. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. . . . Such an ancillary effect on the state treasury is a permissible and

[13] While *Edelman* involved an Illinois statutory provision which was found to be inconsistent with a federal regulation, the present lawsuit involves a state statute [Act 48, §12 Mich. Pub. Acts of 1970] which was found to be an unconstitutional interference with Fourteenth Amendment rights, 433 F.2d 897 (6th Cir. 1971), and other actions by state officials and agencies found to have violated those same rights. *Milliken* v. *Bradley*, 418 U.S. 717, 725-28, 746 (1974).

> often inevitable consequence of the principle announced in *Ex parte Young*, *supra*. 415 U.S. at 667-68.[14]

Thus, the majority opinion in *Edelman* recognized that the Eleventh Amendment would not apply "where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments . . .". 415 U.S. at 666 n. 11. Additionally, some ancillary effect on the state treasury was acknowledged as "a permissible and often inevitable consequence" of injunctive relief. 415 U.S. at 668.

The order below conforms with the requirements of *Ex parte Young* and *Edelman*. Rather than being a retroactive payment of compensation, the requirement that the State Defendants finance a portion of the desegregation remedy is merely a "necessary consequence of compliance in the future with a substantive federal-question determination" which is required by a "court-imposed obligation". 415 U.S. at 668. *See Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666, 2673 (1976) (concurring opinion of Justice Stevens).

The decision of the lower courts herein follows the remedial command of the Fourteenth Amendment. It does not present a case which imposes a money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward both the Detroit Board and State Defendants to implement educational components as a part of a prospective plan of injunctive relief to eliminate the vestiges of segregation,

[14] In addition to citing *Graham* v. *Richardson*, 403 U.S. 365 (1971) (furnishing welfare benefits to aliens) and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (no termination of welfare benefits without prior hearing), for examples of cases where the result of compliance with a court decree meant an impact on the state treasury, this Court could also have cited other examples of the reaffirmation of other constitutional rights which may involve demands upon the state treasury. *see, e.g., Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (furnishing counsel for all indigents charged with misdemeanors); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (furnishing counsel for all indigents charged with felonies); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (legislative reapportionment) *King* v. *Smith*, 392 U.S. 309 (1968) (AFDC benefits must be paid to a family with a "substitute" single father); *Georgia Railroad and Banking Co.* v. *Redwine*, 342 U.S. 299 (1952) (enjoined the State Revenue Commissioner from assessing or collecting ad valorem taxes).

now and hereafter. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Because the State Defendants have been found guilty of unconstitutional acts and actions, their Eleventh Amendment defense is necessarily limited by the remedial requirements of the Fourteenth Amendment. *Cf. Fitzpatrick* v. *Bitzer, supra.*

In reviewing the facts and the relevant law, it becomes readily apparent that the present State Defendants through the exercise of the inherent powers which they possess as officers and instrumentalities of the State and through the persuasive powers which their offices command, can and should effectuate and implement the educational components ordered by the lower court.[15] To rule to the contrary on the basis of an Eleventh Amendment prohibition would result in an erroneous constitutional premise unfounded in law, presenting faulty precedent and ultimately serving to further penalize the school children in the Detroit system rather than in assisting in affording them a realistic and workable remedy for an unconstitutional condition.

It is inconceivable that an interpretation could be placed upon the Eleventh Amendment *vis-a-vis* the Fourteenth Amendment which would prohibit or meaningfully inhibit the implementation of a school desegregation remedy in full vindication of Fourteenth Amendment rights for the sole reason that part of the costs of the remedy would have to be paid from state funds. Such a result would give lie to the Fourteenth Amend-

[15] Several Courts of Appeals have found an affirmative duty for state officials to assist in remedying unconstitutional conditions and have rejected the Eleventh Amendment arguments of State officials attempting to avoid the constitutional responsibilities. *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974) (holding that a state legislature is not free, for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individuals' constitutional rights); *United States* v. *Board of School Commissioners of Indianapolis*, 503 F.2d 68, 82 (7th Cir. 1974) (holding that the Eleventh Amendment does not prevent the enforcement of the Fourteenth Amendment); *Lewis* v. *Shulimson*, 534 F.2d 794, 795 (8th Cir. 1976) (holding that the notification expenses and the future medical assistance payments were the necessary result of compliance with the decree which by its terms was prospective in nature).

ment proposition that "within its limits it is complete", *Ex parte Virginia, supra; Bitzer, supra,* and would forever foreclose effective relief under the Fourteenth Amendment for official, state-imposed constitutional violations.[16]

B. THE ELEVENTH AMENDMENT MAY NOT BE ASSERTED TO PREVENT EFFECTIVE RELIEF FOR A VIOLATION OF THE FOURTEENTH AMENDMENT.

The Eleventh Amendment contains limitations with respect to the exercise of federal judicial power in certain actions brought against the States, while the Fourteenth Amendment grants the individual private rights which limit the power of the States. When conflicts arise the Fourteenth Amendment, without question, must prevail over the Eleventh Amendment.

The Supreme Court has never specifically decided this issue. In *Ex parte Young*, 209 U.S. 123 (1908), the Court found it unnecessary to decide this issue and stated:

> We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth Amendment], but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment. 209 U.S. at 150.

Nor was the issue addressed in either *Edelman* v. *Jordan*, 415 U.S. 651 (1974) or *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976). Those cases dealt respectively with the denial of benefits

[16] Interestingly, neither the State Defendants nor *Amici* argue that the relief contemplated by the lower court order can never be granted. Rather, they contend that the only constitutional violation which would form a predicate for this relief is a state educational financing violation. (Brief of State Defendants at 24-25; Brief of *Amicus* National Association of Attorney Generals at 10; Brief of *Amicus* State of Texas at 4-6). However, the State Defendants have been found to be a substantial cause of the racial segregation in Detroit schools. Additionally, the State Defendants were involved with activities under an unconstitutional statute. *See* n. *13, supra*. The thrust of this argument elevates form over substance and would create a new standard for equity review. Under the State Defendants' theory of a remedy, a court could *not* employ such traditional school desegregation tools as rezoning, school pairings and clusterings, grade reorganizations, magnet schools, city-wide schools, busing, etc. absent a proven constitutional violation in that area. Equity power has never been so limited.

in violation of the Social Security Act and sex discrimination in violation of Title VII and did not involve violations of the Fourteenth Amendment. *See Edelman* v. *Jordan*, 415 U.S. at 694 n. 2 (Marshall J., dissenting); *Fitzpatrick* v. *Bitzer*, 96 S. Ct. at 2668 n. 3.

This case involves more than violation of federal statutory law. The conduct of the State Defendants violated not only 42 U.S.C. §§1981 and 1983, but also constituted a direct violation of the equal protection provisions of the Fourteenth Amendment. The State Defendants have engaged in conduct spanning decades which deprived generations of Detroit black students equal educational opportunities. There can be no doubt that the Eleventh Amendment cannot be used to frustrate the remedial commands of the Fourteenth Amendment in desegregation cases.

1. The Eleventh Amendment Was Not Intended to Bar Suits Against States Arising Under the Constitution of the United States.

Federal Court jurisdiction is provided by Article III, Section 2 of the Constitution. In *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), Chief Justice Marshall provided the conceptual framework for determining the extent of judicial power extended by Article III, Section 2. He explained that federal jurisdiction consists of two classes: (1) "character of the cause", those actions brought under the Constitution and the laws of the United States, and (2) "character of the parties", those actions of a diversity type nature.

In *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court upheld the rights of two South Carolina citizens to collect a debt owed by the State of Georgia on the authority that Article III, Section 2 granted jurisdiction to the federal courts in actions between a state and a citizen of another state. The Eleventh Amendment was ratified in 1798 in response to *Chisholm*. It was only intended to foreclose federal courts from hearing suits, like *Chisholm*, which were brought pursuant to federal jurisdiction based on the character of the parties.

Logic dictates no other conclusion. Federal question jurisdiction did not vest original jurisdiction in federal courts by the Judiciary Act of 1789. Warren, *New Light in the History of the Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). Such jurisdiction did not arise until the Judiciary Act of 1885. 18 Stat. 470, ch. 137, §1. Consequently, the remedial intent of the Eleventh Amendment could not have contemplated the prohibition of federal question jurisdiction. As such, federal question claims under the Fourteenth Amendment are not barred by the Eleventh Amendment.

In *Hans* v. *Louisiana*, 134 U.S. 1 (1890), the Court, while interpreting the Eleventh Amendment, assumed that federal question suits fell within the purview of sovereign immunity. The Court in *Hans*, 134 U.S. at 10 approached the matter in a conclusionary fashion by citing *In re Ayres*, 123 U.S. 443 (1887), *Hagood* v. *Southern*, 117 U.S. 52 (1886), and *Louisiana* v.

Jumel, 107 U.S. 711 (1882). These three decisions involved actions under the contract clause, but the issue of the application of sovereign immunity was never raised. Certainly the decision in *Hans* is of limited precedential value since this Court did not treat the question on the merits. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

2. The History Of The Fourteenth Amendment Indicated Reliance Was Not To Be Placed Upon State Enforcement Of Constitutional Rights, And That Federal Courts Were To Have Inherent Jurisdiction To Protect Such Rights.

The opponents of the Reconstruction Amendments (Thirteenth, Fourteenth and Fifteenth Amendments) and legislation objected to such measures on the ground that reliance could be placed on the "honest purpose of the Several States" to protect the rights of citizens. Cong. Globe, 39th Cong., 1st Sess. 1064, 1294 (1866). In response to that argument Representative Wilson, speaking in favor of an 1866 Civil Rights Bill stated:

> If the States would all observe the rights of our citizens, there would be no need for this bill . . . If they would recognize that general citizenship . . . which under this [privileges and immunities] clause entitles every citizen to security and protection of personnal rights, . . . we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny. Cong. Globe, 39th Cong., 1st Sess. 1117-18 (1866).

Further amplification was made by Representative Cook:

> Suppose . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen . . . It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them . . . Does any man in this House believe that these people can be safely left in these States without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men. Cong. Globe, 39th Cong., 1st Sess. 1124-25 (1866).

Six years of experience after the Civil War served only to confirm Congress' fears in this regard. The Civil Rights Act of 1871 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerence or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U.S. 171, 197 (1961). More than a century after the ratification of the Reconstruction Amendments, history has shown that the States not only cannot be looked to for protection of such rights, but that the States, including Michigan, have actively engaged in the denial of constitutional rights. *See, e.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

At several points in the congressional debates the proponents of the Reconstruction Amendments complained of the inability of federal courts to protect the natural rights of individuals from infringement by the States because of their lack of power to order compliance by the States with the "Bill of Rights". J. ten Broek, Equal Under Law, 95 n. 198, 128 (1965). Representative Bingham, who drafted a substantial portion of Section 1 of the Fourteenth Amendment, stated that it was

intended to reverse the position taken in *Baron* v. *Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights did not apply to the States. He expressed his thinking on the extent of the Fourteenth Amendment in debates on the Civil Rights Act pending before Congress in 1871:

> In re-examining that case of Barron, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."
>
> Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'No state shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts', imitating their example and imitating it to the letter, I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Cong. Globe, 42d Cong., 1st Sess. 83 App. (1871).

The only possible conclusion is that the drafters of the Reconstruction Amendments intended that federal courts have federal question jurisdiction for the maintenance of suits against the States, which violated the rights guaranteed by those Amendments.

3. The Fourteenth Amendment Granted Citizens Substantive Rights Which Can Be Enforced Against the States.

The Reconstruction Amendments were remedial in nature. They were intended to recognize rights that many abolitionists claimed existed by virtue of the privileges and immunities clause and the Bill of Rights. *See generally* J. ten Broek, Equal Under Law (1965). Representative Bingham explained that the Fourteenth Amendment did not create new substantive rights at the expense of the state:

> [T]his amendment takes from no state any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. Cong. Globe, 39th Cong., 1st Sess. 1117 (1866).

The Fourteenth Amendment was intended to limit the exercise of state power, which had been used to deprive citizens of their constitutional rights.

While introducing the proposed Fourteenth Amendment to the Senate, Senator Howard discussed the objectives of Section 1:

> Now sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. *The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (emphasis added).

The Fourteenth Amendment was not only intended to restrain the exercise of state power, but also contemplated substantive rights to compel states to respect fundamental guarantees.

The proponents of the Civil Rights Acts recognized that the Acts were not intended to create new rights. Substantive rights already existed by the provisions of the Constitution. Representative Wilson's discussion of the 1866 Civil Rights Bill is enlightening:

> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. *We are following the Constitution. We are reducing to statute from the spirit of the Constitution. We are establishing no new right, declaring no new principle.* It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (emphasis added).

The Civil Rights Acts were aimed at providing remedies. Representative Bingham gave examples of the citizens' lack of remedy during debate of the 1871 Civil Rights Act:

> The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, *the citizen had no remedy*. They denied trial by jury, and *he had no remedy*. They took property without compensation, and *he had no remedy*. They restricted the freedom of the press, and *he had no remedy*. They restricted the freedom of speech, and *he had no remedy*. They restricted the rights of conscience, and *he had no remedy*. They bought and sold men *who had no remedy*. Cong. Globe, 42d Cong., 1st Sess. 85 App. (1871). (emphasis added).

Both the history of the Fourteenth Amendment and the subsequent Civil Rights Acts disclose that the Fourteenth Amendment granted citizens substantive rights that were enforceable against the States.

Most recently in *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976) this Court recognized the substantive nature of the rights contained in the Fourteenth Amendment and the direct limitations superimposed on the States thereby when it stated:

> In that section Congress is expressly granted authority to enforce "by appropriate Legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. 96 S. Ct. at 2671.

If any doubt remains as to the substantive nature of the Fourteenth Amendment, the Court should look to the contemporaneous Fifteenth Amendment. It, like the Fourteenth Amendment, is a Reconstruction Amendment. The Fifteenth Amendment has always been treated as creating substantive rights that are self-executing, without further legislative specification. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966) and cases cited therein. If the Fifteenth Amendment creates substantive rights, the Fourteenth Amendment must do likewise. These Fourteenth Amendment rights are enforceable against the States in federal court.

4. Interpretation Of The Scope Of The Fourteenth Amendment Has Recognized That It Was Intended To Modify And Limit The Operation Of The Eleventh Amendment.

Although the State of Michigan would have the Court believe that the Eleventh Amendment is coextensive with the Fourteenth Amendment, not even the leading case of *Ex parte Young*, 209 U.S. 123 (1908) can suggest such a result. Obviously, at the time of *Young*, this Court did not regard the Eleventh Amendment as an equal of the Fourteenth Amendment. If this Court had, it would not have circumvented the Eleventh Amendment by creating the fiction that the action was not against the state, but against state officials acting outside their scope of authority. As stated in *Louisiana State Board of Education* v. *Barker*, 339 F.2d 911, 914 (5th Cir. 1964), the time has come to hold that the Eleventh Amendment does not con-

template a suit based on state action, contrary to the Fourteenth Amendment, rather than to continue to recognize the anomaly of *Ex parte Young*, *supra*.

Although some deference is given to the equal validity of all the constitutional amendments, the fact of the matter is that the Eleventh Amendment has always been subordinate to the Fourteenth Amendment. The opinion in *Prout* v. *Starr*, 188 U.S. 537 (1903), is very instructive:

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. *Much less can the 11th Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments*. 188 U.S. at 543 (emphasis added).

The policy considerations for giving the Fourteenth Amendment full effect were discussed in *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908):

> Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against

> state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation. . . . The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. See *Ex parte Young*, where this subject is fully discussed and the cases reviewed. 209 U.S. at 226-27.

In *Home Telephone and Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913), an action was brought in federal court challenging telephone rates set by the defendant as unreasonably low in violation of the Fourteenth Amendment. The defendant claimed no federal jurisdiction because the alleged acts were in violation of a similar state constitutional prohibition. Consequently, it was claimed that the alleged acts could not be acts of the state for purposes of jurisdiction under the Fourteenth Amendment.

The Court rejected the theory and hypothesized that if the state supreme court should determine the acts of the defendant were authorized by the state, then a federal court would be barred by the Eleventh Amendment from hearing such a suit. *Home Telephone and Telegraph Co.*, 227 U.S. at 285. Such a theory rests on the premise that *Ex parte Young*, *supra* could not apply, because the acts were those of the state itself and not a state official acting outside the scope of authority.

This Court found such a construction of the Fourteenth Amendment incorrect for it failed to reach the acts of the state. The Court noted:

> The provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, *are addressed, of course, to the States*, but also to every person whether natural or judicial who is the repository of state power. By this construction, the reach of the Amendment *is shown to be coextensive with any exercise by a State of power, in whatever form exerted*. 227 U.S. at 286 (emphasis added).

This is an explicit recognition by the Court that the Fourteenth Amendment was addressed to the acts of the state and applied to all power exercised by the state no matter who may exercise that power.

Further discussion reveals that the Court conceived the Fourteenth Amendment to operate on activity of the state within its governmental capacity:

> The Amendment, looking to the enforcement of the rights which it guarantees, and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that *States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions*, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. 227 U.S. at 287 (emphasis added).

In *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976) this Court recognized that the Fourteenth Amendment quite clearly contemplated limitations on state authority. Justice Rehnquist, speaking for the court, quoted approvingly from *Ex parte Virginia*, 100 U.S. 339 (1908):

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.
>
> * * *
>
> But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. 96 S. Ct. at 2670-71.

Justice Rehnquist concluded that since *Ex parte Virginia*, there has been a discernible recognition in decisions of the Supreme Court of a shift in the federal-state balance in favor of the former. *Fitzpatrick* v. *Bitzer*, 96 S. Ct. at 2671.

The import is clear. The Fourteenth Amendment by its very construction was intended to regulate state power as it relates to the rights of the citizen.

The manifest desire of Congress, in framing the Reconstruction Amendments and the Civil Rights Acts, was to exercise all its power to create an effective remedy and to withdraw from the States the power to defeat or prevent enforcement of certain basic rights. The Reconstruction Amendments, including the Fourteenth Amendment, contain substantive rights, *Fitzpatrick* v. *Bitzer*, 96 S. Ct. at 2670, for which redress may be sought against the States. The States ratified these Amendments and must be bound by their substantive limitations.

Under these circumstances, the Fourteenth Amendment is completely inconsistent and incompatible with the assertion by the State that the Eleventh Amendment limits the power of federal courts to remedy substantive violations of the Fourteenth Amendment.

For these reasons, this Court has no alternative but to find that if there is any conflict between the Fourteenth and Eleventh Amendments, the Fourteen Amendment must prevail. To hold otherwise would render the Fourteenth Amendment meaningless.

C. THE STATE OF MICHIGAN HAS BY SPECIFIC STATE STATUTE EXPRESSLY WAIVED ITS ALLEGED ELEVENTH AMENDMENT IMMUNITY TO SUITS IN FEDERAL COURT.

Assuming *arguendo* the applicability of the Eleventh Amendment to a desegregation case, the State of Michigan has expressly consented to be sued by waiving its alleged Eleventh Amendment immunity by statutorily authorizing the State Board

of Education to sue and be sued. Mich. Comp. Laws Ann. §388.1007. That enactment sets forth the general powers and duties of the State Board of Education, and in relevant part provides:

> The state board of education is a body corporate and . . . may sue and be sued, plead and be impleaded in *all* the courts *in* this state . . . (emphasis added).

The Eleventh Amendment may be waived by a state. *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). This Court has held that such a waiver must be by express language or by implication from the text of a waiver provision, *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). There is absolutely no question that the State of Michigan, by express language, has waived any alleged immunity.

A state may limit its consent to suits in state courts, without consenting to federal court suits. *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900). However, such limited consent has been found to exist only where the cause of action arises by state law and relates to state tax laws. *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 465-66 (1945); *Great Northern Life Insurance Co.* v. *Read, Insurance Commissioner*, 322 U.S. 47, 53-55 (1944); *Chandler* v. *Dix*, 194 U.S. 590, 591-92 (1904). The theory behind limited consent is that the States may reserve primary control over the operation of their tax laws. *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U.S. 573, 577 (1946). The claim here does not arise under a state cause of action nor does it focus on a state tax law. Rather, this case involves federal constitutional principles relating to the segregation of Detroit schools by the State Defendants who have been found to be the wrongdoers.

The waiver provision of Mich. Comp. Laws Ann. §388.1007 is a broad and general grant of the powers and obligations to the State Board of Education. Its express language of waiver "in all courts in this state" is all inclusive. It authorizes suits in "*all*" courts, nor merely *state* courts; and in courts "*in*" this state, not courts *of* this state. A Federal district court located in Michigan is encompassed within the meaning of "all courts", and it is "in this state".

The Court of Appeals for the Third and Sixth Circuits have reached the same conclusion. *Gerr* v. *Emrick*, 283 F.2d 293 (3d Cir. 1960); *Soni* v. *Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). In *Gerr* v. *Emrick, supra*, the Third Circuit found that a provision of the Pennsylvania Turnpike Act which permitted actions brought only in the "proper courts at the County of Dauphin", authorized suit in a U.S. District Court situated in that county.

This Court reached the same conclusion in *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894), when it construed a similar Texas statute as authorizing suits in federal courts:

> Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is "a court of competent jurisdiction in Travis County." 154 U.S. at 392.

Most recently, in *Oliver* v. *Kalamazoo Board of Education*, Docket No. K88-71 C.A. (W.D. Mich. Nov. 5, 1976), a U.S. District Judge sitting in Michigan held that the State of Michigan expressly waived its alleged Eleventh Amendment immunity, thereby consenting to suits in federal courts by statutorily authorizing the State Board of Education to sue and be sued. Mich. Comp. Laws Ann. §388.1007. The District Court was unable to find any legislative history of the statute evincing an intent to restrict the waiver of immunity to state courts.

This Court exercises great hesitancy to overrule decisions by federal courts skilled in the interpretation of state law unless their conclusions are shown to be unreasonable. *Propper* v. *Clark*, 337 U.S. 472, 486-87 (1949); *Bishop* v. *Wood*, 96 S. Ct. 2074, 2078 n. 10 (1976). The views of federal judges, who are

familar with the intricacies and trends of local law and practice, are given great deference. *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 629-30 (1946).

The statute involved could not be clearer. It waives any immunity to suit in "all courts in" Michigan. A federal district court within Michigan is such a court. That is the view of this Court in *Reagan, supra*, the Third and Sixth Circuits and a District Court in Michigan. For these reasons, the State of Michigan's Eleventh Amendment immunity argument is totally without merit.

IV.

THE DISTRICT COURT'S ORDER REQUIRING THE STATE DEFENDANTS TO ASSIST IN REMEDYING THE CONSTITUTIONAL VIOLATION THEY HAVE CAUSED CANNOT BE HINDERED BY STATE LAWS.

The District Court ordered the Detroit Board and the State Defendants to institute remedial educational components (PA 146a-47a) as a *part* of a remedy. The District Court did *not* order any of the State Defendants to pay out unappropriated funds from the state treasury.[17] Allocation of the cost of the remedial educational components between the parties was merely incidental to the implementation of a prospective injunctive remedy. The order did not require nor result in the restructuring of state school financing.

The State Defendants' reliance on *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), to shield them from inclusion in the remedy is inapposite. The State Defendants are *not* being ordered to remedy school segregation because of a finding that Michigan's system of financing education violates the Constitution; nor does the remedy ordered require any disruption of Michigan's state-wide system of financing public education.[18] *Rodriguez* does not apply to the issue here:

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[17] The provision of the State Constitution, art. IX, §17, that no money shall be paid out of the state treasury except in pursuance of appropriations made by law does not restrict appropriations to legislative enactments. There can be constitutional appropriation apart from any action by the Legislature. *Civil Service Commission* v. *Auditor General*, 302 Mich. 673, 679, 5 N.W.2d 536 (1942). The contrary contention by State Defendants and citation therefore. Brief at 28 n. 16, is incorrect and construes statutory language rather than the constitutional language discussed in *Civil Service Commission*. Regardless, the District Court did not order payment of unappropriated state funds and the remedy ordered is not as the State Defendants continuously mischaracterize it to be.

[18] However, the very State Defendants have admitted that Michigan's educational financing system does violate equal protection. *See* Brief of State Defendants Milliken and Kelley as Plaintiffs in *Milliken* v. *Green*, 389 Mich. 1, 203 N.W.2d 457 (1972); 4960a Mich. Sup. Ct. Rec. and Briefs, June Term, 1972 at 56-63. There, these same State Defendants were plaintiffs challenging the constitutionality of Michigan's educational financing and acknowledged that " . . . no rational basis exists to support the system when tested by the equal protection clauses of the federal and state constitutions." June Term 1972 Brief at 57.

whether co-defendants jointly guilty of violating the Fourteenth Amendment rights of Detroit school children must share in the cost of the remedy for that violation.

The law of this case is that the State Defendants were found to have been a substantial cause of *de jure* segregation in Detroit for which a future remedy must be provided (see pages 5-6, 47, *supra*).

Once the State's action has been determined to have caused the segregation, as in this case, then it is the federal court's duty to require the State Defendants to remedy the segregated condition. *Cooper* v. *Aaron*, 358 U.S. 1, 4, 16 (1958); *Evans* v. *Buchanan*, 379 F.Supp. 1218, 1221-22 (D. Del. 1974), *aff'd*, 423 U.S. 963 (1975), *rehearing denied* 423 U.S. 1080 (1976); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 187 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Moreover, the State Defendants must provide the remedy without a resultant curtailment of the educational programs presently in operation in Detroit schools. *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

A desegregation plan is a matter of a federal remedy for the violation of a constitutional right. The State Defendants, as adjudicated wrongdoers, may not escape a remedy for school segregation by arguing that their partial financing of the desegregation plan is in contravention of state law. *See United States* v. *State of Missouri*, 515 F.2d 1365, 1372-73 (8th Cir. *en banc* 1975), *cert. denied*, 423 U.S. 951 (1975); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974). There is nothing in state law which prohibits either the State or the state officers responsible for discharging educational duties imposed upon them by the State Constitution and various legislative acts from assisting financially to operate a constitutional school system. Any contention to the contrary is untrue, makes a mockery of the Supremacy Clause of the Constitution, art. VI, §2 and nullifies *Brown I*, 347 U.S. 483 (1954), *Brown II*, 349 U.S. 294 (1955) and their progeny.

State policy and state law which hinders or impedes constitutional rights must fall. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971).[19]

In *United States* v. *State of Missouri*, 515 F.2d 1365, 1373 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975), the Eighth Circuit *en banc* unanimously reaffirmed the power and duty of a federal court to fashion an effective desegregation remedy, even when that remedy includes "that provision be made for the levying of taxes essential to the operation of" a court ordered multi-district desegregation remedy. The Eighth Circuit did not find a state constitutional provision limiting the amount of school tax levy to be a hindrance in ordering a remedy. Rather, the Court found it "anomalous to suggest that the district court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy". 515 F.2d at 1372.

The State Defendants cannot argue that only the legislature may determine the priority of allocation of state funds, when agencies and officers of the state are guilty of constitutional violations. It is no answer to a constitutional remedy to say that implementing the remedy will cause an adjustment in a government budget. This argument was rejected in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), when this Court struck down a one year residency requirement as an unconstitutional denial of welfare assistance by stating that while "a State has a valid interest in preserving the fiscal integrity of its programs . . . The savings of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633. Similarily, the saving of general education dollars in Michigan cannot justify the abstention of the State Defendants from a remedy for the invidious classification of school segregation in Detroit. A similar contention by Alabama officials that the lower court encroached on the pro-

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[19] In 1972, for example, the Michigan Legislature mandated that allocations from the school transportation section of the State School Aid Fund to school districts were not to be used for the purpose of busing to achieve a racial balance of students. Mich. Comp. Laws Ann. §388.1179. Such a state prohibition cannot frustrate a constitutional remedy. *Cf. Cooper* v. *Aaron*, 358 U.S. 1 (1958).

vince of decision-making powers of the legislature was rejected in *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

The State Defendants are engaging in legal sophistry when they argue that the District Court's order usurps the legislative prerogative to appropriate state funds. The District Court did not order a money judgment against the state treasury, but rather ordered a remedy for school segregation. It is up to the parties to implement that remedy. The Detroit Board must conform its actions and allocate its budget funds consistent with the constitutional requirements. The State Defendants, the state officials responsible for education in Michigan, must also conform their actions and allocate budget funds consistent with the same constitutional requirements.

The State Defendants have already paid, from appropriated funds, the 5.8 million dollars as their share of the costs of implementing the reading, in-service training, testing, and counseling and guidance programs. The District Court did *not* appropriate any of this money. Rather, the District Court has set forth the requirement that, should the State Defendants choose to continue the state function of education, the delivery of education in Detroit schools must conform with constitutional standards. Constitutional standards require the financial assistance of the State Defendants. Thus, the District Court properly included a joint wrongdoer in a remedy for a joint constitutional violation.

V.

THE DISTRICT COURT'S ALLOCATION OF THE REMEDY BETWEEN JOINT WRONGDOERS PROPERLY CONSIDERED THE PERVASIVE STATE CONTROL OF EDUCATION AND THE CRITICAL FINANCIAL CONDITION OF THE DETROIT BOARD.

The lower courts' requirement that the State Defendants help finance the remedy in Detroit is entirely consistent with the State Defendants' constitutional and legislative responsibility for supervising and financing local school districts in Michigan. In allocating the remedial obligations, the District Court properly considered four facts: the Michigan policy of vesting complete control of education in state officials with state-wide authority; the power of general supervision of local school districts by the State Board of Education; the state constitutional requirement that the Legislature finance education; and the relative ability of the Detroit Board and State Defendants to pay for the costs of desegregation.

Regardless of what may be true in other states, education in Michigan is solely a state function pervasively controlled by the State. The current Michigan Constitution of 1963 provides:

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. . . . Mich. Const., art. VIII, § 2.[20]

Although the Michigan legislature has created local school districts for administrative convenience, the Michigan Supreme Court has consistently held that these local districts are mere instrumentalities and agencies of the state pervasively controlled by the state. *Lansing School District* v. *State Board of Education*, 367 Mich. 591, 116 N.W.2d 866 (1962) (interpreting art. IX, § 9 of the Michigan Constitution of 1908); *Welling* v. *Livonia*

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[20] Michigan's three previous constitutions [Mich. Const., art. X, § 3 (1835); art. XIII, § 4 (1850); art. XI, § 2 (1908)], in addition to the Northwest Ordinance of 1787, contained language substantially the same as the above-quoted constitutional language, and clearly reposed the responsibility for education in Michigan with the state making it no part of the local self-government.

Board of Education, 382 Mich. 620, 624, 625, 171 N.W.2d 545, 546-47 (1969) (interpreting the Michigan Constitution of 1963).[21]

The citizens of Michigan have also required the Michigan Legislature to finance the local school districts. Mich. Const. art. IX, § 11 (1963).

The legislature responded by appropriations of state school aid funds and other taxes to local school districts under certain formulae. Act 258, Mich. Pub. Acts of 1972, Mich. Comp. Laws Ann. § 388.1101, *et seq.*, as amended by Act 2, Mich. Pub. Acts of 1973 (Bursley School District Equalization Act of 1973).[22]

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[21] For other cases where the Michigan Supreme Court has clearly and unequivocably held that education is a state function with no part of local self-government, *see Attorney General, ex rel. Kies* v. *Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902); *Attorney General* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908); *MacQueen* v. *City Commission of the City of Port Huron*, 194 Mich. 328, 336, 160 N.W. 627, 629 (1916); *Collins* v. *City of Detroit*, 195 Mich. 330, 335-36, 161 N.W. 905, 907 (1917); *Child Welfare Society of Flint* v. *Kennedy School District*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

[22] The Bursley Act provides, *inter alia*, a power equalizing formula to supply a more uniform flow of state revenues to school districts in order to remedy the widely variant per pupil State Equalized Value (SEV) tax yield expenditures on students among the districts. Mich. Comp. Laws Ann. §388.1121. The Bursley Act also provides additional school revenue to districts by recognizing the municipal tax overburden inequities suffered by several school districts. This overburden results in the inability of school districts such as Detroit to raise sufficient millage revenues to deliver equal educational services due to the inability to levy a sufficiently high millage in the face of numerous other municipal taxes shouldered by the taxpayers. Mich. Comp. Laws Ann. §388.1125; (A 23-24; 104-12). The State thus recognizes the need for State officers and agencies to supplement local school revenues with state aid. State aid comprises approximately 50% of the Detroit Board budget.

The Michigan Constitution of 1963 vested the State Board of Education with the power to supervise all local school districts as established by the legislature. The State Board of Education is vested with "leadership and a general supervision over all public education" and the Superintendent of Public Instruction is the "principal executive officer of the State Department of Education". Mich. Const. art. VIII, § 3 (1963).[23] The Governor is an *ex officio* member of the State Board of Education. The powers of the State Board of Education are state-wide and pervasive.[24]

The Governor retains executive power in Michigan; is authorized to submit a budget to the legislature and amendments to appropriation bills in order to fully fund various programs; and is

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[23] The State Board of Education is a body corporate with the power to purchase and dispose of real and personal property of every kind. Mich. Comp. Laws Ann. §§ 388.1007 and 388.1008. As a body corporate, it has the power to borrow money and issue securities evidencing debt. Mich. Const. art. IX, § 13 (1963). Article IX, § 14 of the Michigan Constitution of 1963 grants the Legislature the authority for short term borrowing to meet obligations incurred pursuant to deficient appropriations.

[24] The pervasive control of the State over its agents is illustrated by: the many school district consolidations, mergers and annexations which have occurred at the direction of the Superintendent of Public Instruction and the State Board of Education; the Legislature has passed legislation providing for emergency financial relief to various nearly bankrupt school districts (Act 32, Mich. Pub. Acts of 1968; Act 255, Mich. Pub. Acts of 1972; and Act 12, Mich. Pub. Acts of 1973); the State Board of Education has the absolute power to transfer property from one local school district to another. *Lansing School District* v. *State Board of Education*, 367 Mich. 591, 116 N.W.2d 866 (1962); *Imlay Township District* v. *State Board of Education*, 359 Mich. 478, 102 N.W.2d 720 (1960); the Superintendent of Public Instruction and the State Board of Education have the power to remove any school board member who refuses or neglects to discharge any of the duties of his office. Mich. Comp. Laws Ann. §340.253; the State Board of Education and Superintendent of Public Instruction may withhold state aid for failure to operate a minimum school year of 180 days. Mich Comp. Laws Ann. § 340.575; a local school district may adopt only textbooks listed with the Superintendent of Public Instruction. Mich. Comp. Laws Ann. § 340.887(1); during the school year, the local school board's administrative flexibility is further restricted by the limitations imposed by the State Board of Education as the Board enforces its rules covering subjects from state aid payments to teacher certification and tenure to school lunches. *See, e.g.*, R383.151-R383.156; R340.351-R340.355; R390.1101-R390.1167; R340.601-R340.605, *Michigan Administrative Code*.

required to submit bills to meet budget deficiencies in current appropriations. Mich. Const. art. V, §§ 1, 18 (1963).[25]

The extent of the Governor's control over the Detroit school district is exemplified by the fact that in a January, 1977 message to the State Legislature, the Governor presented his Executive Budget which set forth *his* requirement that the Detroit Board of Education submit its budget for review to the State Department of Management and Budget on an annual basis. Executive Budget, Fiscal Year 1977-78 at J 32. Prior to this directive by the Governor, the Detroit Board was not required to submit its annual budget to the State Department of Management and Budget. No other school district in Michigan is required to do this.

The power vested and the responsibilities imposed on the Legislature (Mich. Const. art. VIII, § 2 and art. IX, § 11 (1963)), the State Board of Education and the Superintendent of Public Instruction (Mich. Const. art. VIII, § 3 (1963)), the Governor (Mich. Const. art. V, §§ 17, 18 (1963)), the Attorney General and the State Treasurer (voting members of the Administrative Board)[26], show that the named State Defendants are officials with state-wide responsibility for discharging duties imposed on them by the State Constitution to provide non-discriminatory education in public schools.

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[25] Mich. Const. art. V, § 15 (1963) provides that the Governor may convene the Legislature on extraordinary occasions.

[26] Mich. Comp. Laws Ann. § 12.51 provides for the transfer of monies on deposit in various funds in the state treasury to meet state obligations as they become due. The State Treasurer performs this task with the approval of the State Administrative Board. The Governor, the Attorney General, the State Treasurer and the Superintendent of Public Instruction, all Defendants in this matter, are voting members of the State Administrative Board. This Board arranges for local districts to borrow money, Mich. Comp. Laws Ann. § 388.1231; arranges for a local board to obtain a cash advance to meet operating needs, Mich. Comp. Laws Ann. §§ 388.1236, 388.1238. On November 21, 1972, the Administration Board acted to authorize a cash advance to the Detroit Public Schools when it was on the verge of bankruptcy, thus permitting the schools to stay in operation.

Given the foregoing background of pervasive state control and daily involvement in the operations of education in Michigan generally and in the Detroit school system in particular, the inclusion of the State Defendants in a remedy was consistent with the State's policy of supervising and financing school districts.

Having taken testimony on Detroit's financial condition, the District Court properly took account of the relative ability of the joint wrongdoers to pay the remedial cost of a constitutional educational system.[27]

Specifically, the Court found that since 1971, the Detroit school system has experienced a severe financial crisis as a result of the loss of property tax revenues by virtue of urban renewal and highway construction, the exodus of businesses and industry to the suburbs and the concomitant outward population flow from the City of Detroit. (A 20). The combination of loss of revenue and escalating educational costs forced the system into what has been termed a "survival" or "suicide" budget. Consequently, the Detroit school system is forced to eliminate many crucial educational services. By 1973, the Detroit school system had accumulated a $68 million deficit and was within four days of closing its doors due to the lack of funds. (A 15, 66-70).

As a result of special *state* legislation, the Detroit school system was able to finance its debt and continue operations. However, by law, the Detroit Board was required to operate within a balanced budget which has necessitated a continuation of the "survival" budget instituted in 1971. (A 68-69).

Despite the fact that the Detroit system has been under strict state fiscal control since 1973, a 20 million dollar deficit was projected for the 1976-77 fiscal school year. This projected

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[27] The District Court stated:

> The Board operates in a city that has left little room for taxation to operate the school system. . . . Not only is it constitutionally permissible to take these "practicalities at hand" into account in forming a desegregation plan, but it would be irresponsible for this court not to consider such practicalities where the very survival of an already bankrupt school system is at stake. 402 F. Supp. at 1130.

deficit was the result of merely continuing to provide the same minimal services which the Detroit Board provided Detroit public school students in the 1975-76 school year,[28] The increased costs for the 1976-77 school year over the 1975-76 school year reflect *no* increase in the level of programs. The additional cost is merely the increased cost of doing business. Thus, absent additional general operating revenue dollars — totally apart from dollars necessary for a desegregation program — programs will have to be, and have been, cut.[29]

With the August 5, 1976 and November 2, 1976 millage defeats in Detroit, the voters had defeated ten of the last eleven millage elections for additional school revenue. This is due to the fact that Detroit taxpayers shoulder the highest tax burden in the State (A 73-74; 104-112); have the highest municipal tax burden in the state (A 23, 25-26; 73; 115); and pay a higher property tax rate than the state average (A 73).

Another contributing factor in the financial crises of the Detroit Board is the fact that the State has never fully funded the municipal overburden section of the Bursley Act. Mich. Comp. Laws Ann. § 388.1125. Detroit is the major recipient of this

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[28] The record reveals that "the cost of education is a function of the size" of the school district. (A 26). The Detroit school district with 236,000 students in approximately 300 buildings is the fifth largest school system in the country. The cost/size ratio which applies to the school budget generally applies to the educational component remedy. The educational components cost $11,645,000 or about $49.00 per pupil. If the Detroit system had 1,000 students the remedy would cost about $49,000; if there were 5,000 students, the cost would presumably be about $245,000.

[29] In November, 1976, as a result of a reduction in estimated state aid for 1976-77 and the veto by the Governor of a "declining enrollment" provision which had been included in the state aid bill passed by the Legislature, the Detroit Board took action to cut 7.4 million dollars from the budget in order to balance the projected expenditures with the projected revenue. Since that time, further revenue reductions totalling approximately 2 million dollars in state aid have occurred. Thus, if expenditures are not reduced to offset the additional cuts in revenue, the school district may still have a potential deficit of up to 2 million dollars by the end of the fiscal year.

Contrary to the representation made by State Defendants in their Brief at 35, the State closed the 1976-77 fiscal year with a 28 million dollar *surplus*. According to State Defendants' Brief, this surplus occurred in spite of the payment of 5.8 million dollars incidental to the remedy.

allocation and in recent years it has never been funded to more than 28% of its authorized limit. (RR VII 119, 121).

Faced with a record of financial crises on the part of the Detroit Board and of a state policy of pervasive control and intervention in the day-to-day operation of local school districts by responsible state officials, the District Court framed its equitable relief by "adjusting and reconciling public and private needs",[30] noting that "the very survival of an already bankrupt school system is at stake"[31] and required the State Defendants to share the cost of the educational components. The relief corrects, "by a balancing of the individual and collective interests, the condition that offends the Constitution",[32] an unconstitutionally racially segregated school system.[33]

There is no argument that in order to exist, the Detroit public schools must be operated and maintained in a constitutional manner. Given the duty imposed upon the State by the Michigan Constitution to provide public education in Michigan and to finance the public school system which is provided, the requirement of the District Court that various responsible State Defendants finance a portion of the additional cost of implementing a desegregation remedy properly falls within the province of the State Defendants and is consistent with the State policy of state control, supervision and financial support of education in Michigan.

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[30] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 300 (1955).

[31] *Bradley* v. *Milliken*, 402 F. Supp., 1096, 1130 (1976).

[32] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

[33] For a complete recitation of the critical financial problems now confronting the Detroit Board of Education, *see* the Appendix incorporated in the Opinion of the Court of Appeals. 540 F.2d at 247-51; (PA 183a-190a). The findings of fact regarding the Detroit Board's fiscal condition are set forth in *Bradley* v. *Milliken*, 402 F.Supp. 1096, 1119-21 (E.D. Mich. 1975). For record testimony on the financial condition of the Detroit school system *see generally*, (A 14-28; 64-80; 84) and exhibits contained at (A 104-21). *See also*, Detroit Board's Brief in Opposition to Petition for Writ of Certiorari filed in October Term, 1976 at 23-26, wherein an updated discussion of the financial condition of the Detroit Board *vis-a-vis* the State's fiscal condition was set forth at length.

Once the citizens of Michigan made the voluntary commitment in the State Constitution to educate the children of the State in public schools, neither the Michigan Legislature nor those named State Defendants who are responsible for discharging the duties imposed upon them by the State Constitution can abrogate or escape those duties merely because an incidental monetary obligation is involved.

There has been no problem of enforcing the remedy against the State Defendants. The State Defendants have already paid the required share of the cost of the remedial educational components.

CONCLUSION

Based upon the record in this case, the remedial educational components of reading, in-service training, testing, and counseling and guidance are essential to eliminate the vestiges of segregation in Detroit. The State Defendants were found to be a cause of segregation in Detroit and cannot invoke the Tenth and Eleventh Amendments to shield themselves from participating in the remedy. As a practical matter, with "the very survival of an already bankrupt school system" at stake, these components cannot be implemented in Detroit without the State Defendants' participation. Without State participation there is no desegregation remedy in Detroit. For these reasons, the Order of the Court of Appeals for the Sixth Circuit affirming the District Court's Order as to educational components and their financing should be affirmed.

Respectfully submitted,

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COMPENDIUM OF WRITINGS AND STUDIES ADVOCATING AND SUPPORTING THE INCLUSION OF EDUCATIONAL COMPONENTS AS ESSENTIAL FOR AN EFFECTIVE DESEGREGATION PLAN

WRITINGS AND STUDIES	SYNOPSIS
IN-SERVICE TRAINING:	
Clark, Kenneth B., Dark Ghetto (1965).	Clark notes at page 132 that stimulation and teaching, based upon positive expectation, seem to play an even more important role in a child's performance in school than does the community environment from which he comes. A key component, Clark argues, of the deprivation which afflicts ghetto children is that generally their teachers do not expect them to learn. This finding suggests the need for in-service training to prepare teachers for the task of educating students from a segregated background by raising the teachers' level of expectation of such children.
Clark, Kenneth B., Prejudice and Your Child (1963).	In chapter three, Dr. Clark discusses the detrimental effects of segregation. It has been found that segregation (1) puts special burdens upon members of a minority group by the clear discrepancy between democratic ideals and the actual practice of en-

WRITINGS AND STUDIES	SYNOPSIS
	forced segregation; (2) acts as a source of frustration for segregated persons; (3) creates feelings of inferiority, submissiveness and conflicts about the individual's worth; and (4) leads to a distortion of what is real. Similarly, in a later chapter, Dr. Clark asserts that the problem will not immediately be solved if segregated schools are eliminated. Teachers have preconceived, negative ideas of black children, and if these assumptions are not countered, the racial and social burdens upon the minority child increase. In turn, the child who is regarded and treated as a problem becomes a problem.
Dentler, Robert A., The Urban R's (1967).	Sol Gordon, at pages 189-204, emphasizes the importance of the teacher's perception of the child's learning ability to the child's performance. Teachers must recognize that school values are a goal, not a prerequisite of learning.
Gerard, Harold B. and Miller, Norman, School Desegregation: A Long-Term Study (1975).	This study strongly supports other studies on the necessity of in-service training in desegregating school systems by demonstrating the presence of direct and indirect

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	influences of teacher attitudes on student achievement.
Green, Robert T. and Virag, Wayne, *Integrating the Desegregated School: A Model for the In-Service Education of School Personnel* (1973) (A paper presented to the National Council for Social Studies Annual Meeting).	The authors emphasize that an in-service program for instructional and administrative personnel must be undertaken to provide additional skills and competencies which will adequately prepare school personnel for the task of educating children in a multi-ethnic classroom.
Mueller, Mildred K., Minn. Dept. of Research and Evaluation, *The Bryant-Anthony-Ramsey (B-A-R) Project: An Evaluation* (1974).	This study and evaluation of a Minneapolis desegregation project urges in-service training for developing teaching skills in situations involving desegregation.
Bynum, Effie M., and others, National Inst. of Education, Dept. of Health, Education, and Welfare, *Desegregation of the Minneapolis Public Schools, Minneapolis, Minnesota: A Case Study* (1974).	In this study, researchers from Columbia University conclude that components such as communication skills among teachers, support staff, flexible academic programs, promotion of the team teaching method, and an increasing willingness of teachers to be open with each other and to deal with conflict are key factors in successful desegregation in Minneapolis.

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Office of Education, Dept. of Health, Education, and Welfare, *Achieving Effective Desegregation* (1973).	This article points out the need for teacher training and curriculum adaptation for implementing an effective desegregation program.
South Holland School District 151, Ill., *Winning Public Support of a Desegregated School System. Title III ESEA Progress Report, School District 151 (South Holland, Illinois)* (1975).	This report discusses the vital need for staff and administration in-service training and professional enrichment activities in a desegregating school system.
Virag, Wayne F., *Integrating the Desegregated School: Some Observations and Suggestions* (Nov., 1973) (A paper presented to the National Council for Social Studies Annual Meeting).	The paper maintains that a key ingredient to achieving an integrated classroom environment is the attitude of teachers. Mr. Virag also argues that, in the past, educational systems have spent little time or resources in preparing staffs for teaching in an integrated climate, and the results have often led to misunderstandings, fear, and hostility among both faculty and students.
Program for Educational Opportunity, University of Michigan, Conference Proceedings, *A Look at the Education of Teachers: Preservice and In-Service* (1974).	(1) Ann Greenstone, at pages 17-20, points out that a child's perception of the teacher's evaluation of the child correlates with the child's self-perception, academic achievement, and

classroom behavior. The author concludes that teachers must be exposed to the history, culture, lifestyles, and experiences of all minority groups to have an effective understanding of their students and an awareness of their students' needs.

(2) Adelfa Arredondo, consultant with the Division of Minority Affairs, Michigan Education Association, at pages 36-41, supports in-service teacher training programs. She argues that a teacher cannot begin to comprehend what a child's educational needs are until he or she knows the child, the child's environment, and becomes familiar with the child's social patterns, beliefs, and ethics.

Program for Educational Opportunity, University of Michigan, Conference Proceedings and Forum Series Papers, *Desegregation and Beyond: The Educational and Legal Issues* (1975).

(1) Dr. Harold Schuler argues that in-service training is necessary to counter racial attitudes formed early in our lives. It also increases sensitivity, on the part of instructional and non-instructional staff, to the problems associated with school desegregation.

(2) At pages 228-230, C. Dwayne Wilson makes the point that, to evaluate a desegregation program, an analysis of certain areas is needed to judge its effect upon minority persons. Key areas are student assignment policies, curriculum revision, in-service training, and community involvement in educational decision-making.

GUIDANCE AND COUNSELING:

Clark, Kenneth B., Dark Ghetto (1965).

A survey by the New York State Division of Youth showed that, of the students from Harlem who entered academic high schools in 1959, 53% became dropouts. This finding indicates the great need for proper counseling and guidance. This need is further demonstrated by the open display of contempt by many of these children toward school. This contempt is clearly related, Clark contends, not only to the high dropout statistics, but also to the hostility and aggression of children in Harlem's ghetto schools. Clark theorizes that such children are revolting against a deep and pervasive attack upon their dignity and integrity as human beings. (Chapter 6).

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Dentler, Robert A., The Urban R's (1967).	Dorothy Schaefer noted a more positive self concept in minority children who attended desegregated schools with remedial services, a guidance program, and special educational facilities for pupils and their families.
Hayes, Edward J. and Rayburn, Wendell G., *Black-White Dilemmas: Counselors, Busing, Desegregation*, School Counselor, Vol. 23, No. 2, pp. 92-102 (1975).	The authors maintain that it is the duty of counselors to avoid confrontation between races by keeping lines of communication open.

TESTING:

Division of Desegregation Studies, National Inst. of Education, Dept. of Health, Education, and Welfare, *Resegregation: A Second Generation School Desegregation Issue* (1975).	In their paper, the authors emphasize how test scores are used to achieve and enhance racial resegregation in education.
Miller, Lamar P., *Testing Black Students: Implications For Assessing Inner-City Schools*, Journal of Negro Education, Vol. 44, No. 3, pp. 406-420 (1975).	The author concludes that it is difficult to separate the issue of testing from the realities which leave black children at the mercy of a unified white majority which is often indifferent to their educational welfare.

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Program for Educational Opportunity, University of Michigan, Conference Proceedings and Forum Series Papers, *Desegregation and Beyond: The Educational and Legal Issues* (1975).	The presentation at pages 76-81 by Dr. Horace Mitchell of Washington University, St. Louis, Missouri, scrutinizes various aspects of testing and test instruments including (1) construct validity, (2) concurrent validity, (3) content validity, (4) predictive validity, and (5) reliability. Dr. Mitchell concludes that existing standardized tests have no validity for members of minority groups and suggests, among other things, that teachers, counselors, and school administrators must be better trained to assess students' abilities without the use of involved standardized tests.

READING:

Racial Isolation in the Public Schools (1967) (A report of the United States Commission on Civil Rights).	At page 162 in a section entitled Remedial Assistance, the Civil Rights Commission states that in desegregating schools, remedial programs in reading are necessary to avoid resegregation because "the root of the problem is continued academic disadvantage".

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Smith, Al, Downs, Anthony, and Lachman, Leanne M., Achieving Effective Desegregation (1973).	This study stresses the importance of instructing teachers in new methods of teaching remedial reading to students who have reading deficits due to racial isolation (p. 131, 234).
Gerard, Harold B. and Miller, Norman, School Desegregation: A Long-Term Study (1975).	Chapter 9 advises that in a desegregation setting teachers of reading must recognize the different backgrounds of black and white children and must gear reading programs to accommodate this background.
Bazeli, Frank P., *Delivery of Pupil Evaluation in the Desegregated High School*, The High School Journal, Vol. 58 (1972).	Professor Bazeli of Northern Illinois University emphasizes the need to evaluate the reading problems of disadvantaged black students who enter the desegregated high school.